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## False Confessions and Testimonial Injustice

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# FALSE CONFESSIONS AND TESTIMONIAL INJUSTICE

JENNIFER LACKEY\*

*In the criminal justice system, confessions have long been considered the gold standard in evidence. An immediate problem arises for this gold standard, however, when the prevalence of false confessions is taken into account. Since 1989, there have been 367 post-conviction DNA exonerations in the United States, and 28% of these involved false confessions. Moreover, false confessions involve everything from minor infractions to detailed accounts of violent crimes.*

*This article takes a close look at false confessions in connection with the phenomenon of testimonial injustice. It argues that false confessions provide a unique and compelling challenge to the current conceptual tools used to understand this epistemic wrong. In particular, it argues that we cannot make sense of the unjust ways in which false confessions function in our criminal justice system by focusing exclusively on speakers getting less credibility than they deserve. It concludes that the way we conceive of testimonial injustice requires a significant expansion to include what is called agential testimonial injustice—where an unwarranted credibility excess is afforded to speakers when their epistemic agency has been denied or subverted in the obtaining of their testimony. At the same time, it shows that work by legal scholars and social scientists can benefit by viewing the practices that produce confessions through the lens of this expanded notion, and hence that epistemological tools can shed light on issues with enormous moral and practical consequences.*

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### INTRODUCTION

In the criminal justice system, confessions have long been considered the gold standard in evidence. Indeed, according to Saul Kassin:

The U.S. Supreme Court has recognized that confession evidence is perhaps the most powerful evidence of guilt admissible in court<sup>1</sup>—so powerful, in fact, that “the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained[.]”<sup>2</sup>

An immediate problem arises for this gold standard, however, when the prevalence of false confessions is taken into account. “A false confession is an admission to a criminal act—usually accompanied by a narrative of how and why the crime occurred—that the confessor did not commit.”<sup>3</sup> Since 1989, there have been 367 post-conviction DNA exonerations in the United

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<sup>1</sup> Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 BEHAV. L. & HUM. BEHAV. 3, 9 (2010) (citation omitted) (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

<sup>2</sup> Kassin et al., *supra* note 1, at 9 (citation omitted) (quoting *Colorado v. Connelly*, 479 U.S. 157, 182 (1986)).

<sup>3</sup> Kassin et al., *supra* note 2, at 5.

Confessions may be deemed false when: (1) it is later discovered that no crime was committed (e.g., the presumed murder victim is found alive, the autopsy on a “shaken baby” reveals a natural cause of death); (2) additional evidence shows it was physically impossible for the confessor to have committed the crime (e.g., he or she was demonstrably elsewhere at the time or too young to have produced the semen found on the victim); (3) the real perpetrator, having no connection to the defendant, is apprehended and linked to the crime (e.g., by intimate knowledge of nonpublic crime details, ballistics, or physical evidence); or (4) scientific evidence affirmatively establishes the confessor’s innocence (e.g., he or she is excluded by DNA test results on semen, blood, hair, or saliva).

*Id.*

States, and 28% of these involved false confessions.<sup>4</sup> Moreover, false confessions involve everything from minor infractions to detailed accounts of violent crimes. In the largest sample ever studied, Steven Drizin and Richard Leo analyzed 125 cases of proven false confessions in the United States between 1971 and 2002 and found that 81% occurred in murder cases, followed by rape (9%) and arson (3%).<sup>5</sup>

In this paper, I take a close look at false confessions in connection with the phenomenon of testimonial injustice. I show that false confessions provide a unique and compelling challenge to the current conceptual tools used to understand this epistemic wrong. In particular, I argue that we cannot make sense of the unjust ways in which false confessions function in our criminal justice system by focusing exclusively on speakers getting *less credibility* than they deserve.<sup>6</sup> I conclude that the way we conceive of testimonial injustice requires a significant expansion to include what I call *agential testimonial injustice*—where an unwarranted *credibility excess* is afforded to speakers when their epistemic agency has been denied or subverted in the obtaining of their testimony.<sup>7</sup> At the same time, I show that work by legal scholars and social scientists can benefit by viewing the practices that produce confessions through the lens of this expanded notion, and hence that epistemological tools can shed light on issues with enormous moral and practical consequences.<sup>8</sup>

## I. CAUSES OF FALSE CONFESSIONS

There are many factors that contribute to people falsely confessing to crimes that they did not commit. Situational factors can significantly impact the likelihood of false confessions, including the length of the interrogation, sleep deprivation, the presentation of false evidence, and minimization

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<sup>4</sup> THE INNOCENCE PROJECT, DNA EXONERATIONS IN THE UNITED STATES: FAST FACTS, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> [<https://perma.cc/T7JA-9SKM>]. As Saul Kassin notes, however,

because this sample 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, the cases that are discovered most surely represent the tip of an iceberg.

Kassin et al., *supra* note 2, at 3.

<sup>5</sup> Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 946 (2004).

<sup>6</sup> See *infra* Section III.

<sup>7</sup> See *infra* Section III.C.

<sup>8</sup> See *infra* Section III.

tactics.<sup>9</sup> Dispositional factors—such as juvenile status, developmental disabilities, and mental illness—can also make false confessions more likely.<sup>10</sup> And even the very innocence of the suspect can increase the probability of a false confession being offered. Let's examine these briefly in turn.

#### A. SITUATIONAL FACTORS

Among situational factors associated with false confessions, the length of the interrogation is one of the more significant. According to cautionary advice from Fred Inbau, single interrogation sessions should not exceed three to four hours “unless the suspect is showing clear potential for telling the truth.”<sup>11</sup> Yet Drizin and Leo found that in cases of false confessions in which interrogation time was recorded, 34% lasted six to twelve hours, 39% lasted twelve to twenty-four hours, and the average length was 16.3 hours.<sup>12</sup> Moreover, lengthy interrogations are often accompanied by other factors that can increase the likelihood of false confessions, such as isolation from significant others, which “constitutes a form of deprivation that can heighten a suspect's distress and incentive to remove himself or herself from the situation,”<sup>13</sup> and sleep deprivation, which “strongly impairs human functioning.”<sup>14</sup>

Regarding false evidence, it is permissible in the United States for police to lie to suspects.<sup>15</sup> Therefore, when involvement in criminal activity is denied, purportedly decisive evidence of guilt can be offered in response. Consider, for instance, the case of Marty Tankleff who, in 1989, was accused at the age of seventeen of murdering his parents, “despite the complete absence of evidence against him.”<sup>16</sup>

Tankleff vehemently denied the charges for several hours—until his interrogator told him that his hair was found within his mother's grasp, that a “humidity test” indicated he had showered (hence, the presence of only one spot of blood on his shoulder), and that his hospitalized father had emerged from his coma to say that Marty was his

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<sup>9</sup> These factors are highlighted in Saul Kassin's article because of the “consistency in which they appear in cases involving proven false confessions.” Kassin et al., *supra* note 2, at 16.

<sup>10</sup> See *infra* Section I.B.

<sup>11</sup> FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 206 (5th ed. 2013).

<sup>12</sup> Drizin & Leo, *supra* note 5, at 948.

<sup>13</sup> Kassin et al., *supra* note 2, at 16.

<sup>14</sup> June J. Pilcher & Allen I. Huffcutt, *Effects of Sleep Deprivation on Performance: A Meta-Analysis*, 19 SLEEP 318, 318 (1996).

<sup>15</sup> See *Frazier v. Cupp*, 394 U.S. 731, 739 (1969).

<sup>16</sup> Kassin et al., *supra* note 1, at 17.

assailant—all of which were untrue (the father never regained consciousness and died shortly thereafter).<sup>17</sup>

Following these lies, Tankleff became disoriented and confessed, but then immediately recanted.<sup>18</sup> On the basis of that confession alone, Tankleff was convicted, and it was not until nineteen years later that his conviction was vacated, and the charges were dismissed.<sup>19</sup> That the presentation of false evidence contributes to such confessions is reinforced by self-report studies, where suspects say that the reason they confessed is that they took themselves to be trapped by the weight of the evidence against them.<sup>20</sup>

Minimization tactics can also lead to false confessions.<sup>21</sup> Such techniques come in three different forms: “those that minimize the moral consequences of confessing, those that minimize the psychological consequences of confessing, and those that minimize the legal consequences of confessing.”<sup>22</sup> For instance, the interrogator may offer sympathy and understanding to normalize the crime, saying, for instance, “I would have done the same thing;” the interrogator might offer minimizing explanations of the crime, such as that the murder was spontaneous or accidental; and the interrogator might communicate promises through pragmatic implication that the suspect will be punished less severely if he or she confesses. All three forms can put pressure of varying degrees on a suspect to confess to a crime that he or she did not commit, especially when used in combination

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<sup>17</sup> *Id.* at 17–18.

<sup>18</sup> See Saul M. Kassir, *False Confessions: Causes, Consequences, and Implications for Reform*, 1(1) POL’Y INSIGHTS FROM THE BEHAV. & BRAIN SCI. 112, 115 (2014).

<sup>19</sup> Kassir et al., *supra* note 2, at 18 (quoting RICK FIRSTMAN & JAY SALPETER, A CRIMINAL INJUSTICE: A TRUE CRIME, A FALSE CONFESSION, AND THE FIGHT TO FREE MARTY TANKLEFF 326–27, 562 (2008)); see also Bruce Lambert, *Freed After 17 Years in Prison, L.I. Man Will Not Face New Trial*, N.Y. TIMES, July 1, 2008, at B1.

<sup>20</sup> See Gisli H. Gudjonsson & Jon F. Sigurdsson, *The Gudjonsson Confession Questionnaire-Revised (GCO-R): Factor Structure and its Relationship with Personality*, 27 PERSONALITY & INDIVIDUAL DIFFERENCES 953, 954 (1999); Stephen Moston et al., *The Effects of Case Characteristics on Suspect Behaviour During Police Questioning*, 32 BRIT. J. CRIMINOLOGY 23, 38 (1992).

<sup>21</sup> See Jessica R. Klaver et al., *Effects of Personality, Interrogation Techniques and Plausibility in an Experimental False Confession Paradigm*, 13 LEGAL & CRIM. PSYCHOL. 71, 81 (2008).

<sup>22</sup> Kassir et al., *supra* note 2, at 30 (citing FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 244, 247 (4th ed. 2001)); see also Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 999, 1054–56, 1098–1104 (1997); Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. IN L., POL. & SOC’Y. 189, 192–93, 227 (1997).

with some of the other techniques, such as the presentation of false evidence.<sup>23</sup>

#### B. DISPOSITIONAL FACTORS

In addition to situational features, there are dispositional factors that increase the likelihood of false confessions, and the two most commonly cited concerns are juvenile status and mental impairment, including developmental disabilities and mental illness. This is supported by the fact that these groups are wildly overrepresented in the population of proven false confessions. “For example, of the first 200 DNA exonerations in the U.S., 35% of the false confessors were 18 years or younger and/or had a developmental disability.”<sup>24</sup> In their sample of wrongful convictions, Samuel Gross, Kristen Jacoby, Daniel Matheson, Nicholas Montgomery, and Sujata Patil found that 42% of the exonerated juveniles and 69% of exonerated persons with mental disabilities were wrongly convicted because of false confessions.<sup>25</sup> There are a number of factors at work here. In both groups, for instance, there can be impairments in adjudicative competence, such as the ability to assist in one’s own defense. There can also be a diminished capacity to grasp legal terms, such as *Miranda* rights.<sup>26</sup>

#### C. INNOCENCE

Finally, false confessions are often facilitated by the very innocence of the suspect. Awareness of one’s own innocence leads people not only to waive their *Miranda* rights to silence and to counsel,<sup>27</sup> but also to be more open and forthcoming in their interactions with police.<sup>28</sup> If you have nothing to hide, you might wonder why you should remain silent and get an attorney. Yet it is not uncommon for the testimony of those who are innocent to be used against them, such as by calling into question their reliability or sincerity on the basis of minor inaccuracies.<sup>29</sup> In addition, when a suspect confesses,

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<sup>23</sup> False confessions are an example of what Rachel McKinney calls “extracted speech.” Rachel Ann McKinney, *Extracted Speech*, 42 SOC. THEORY & PRAC. 258, 259 (2016).

<sup>24</sup> Kassir et al., *supra* note 2, at 19.

<sup>25</sup> Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 545 (2005).

<sup>26</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>27</sup> See Saul M. Kassir & Rebecca J. Norwick, *Why People Waive Their Miranda Rights: The Power of Innocence*, 28 BEHAV. L. & HUM. BEHAV. 211, 218 (2004).

<sup>28</sup> See Saul M. Kassir, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCHOLOGIST 215, 218 (2005).

<sup>29</sup> See *Ohio v. Reiner*, 532 U.S. 17, 21 (2011) (“[T]ruthful responses of an innocent witness . . . may provide the government with incriminating evidence from the speaker’s own mouth.”).

this often leads the police to regard the case as solved, thereby closing the investigation and increasing the likelihood of overlooking exculpatory evidence.<sup>30</sup>

## II. TESTIMONIAL INJUSTICE

With these points in mind, let's now take a closer look at the phenomenon of testimonial injustice. The standard view is that a speaker is a victim of testimonial injustice when she is afforded a credibility deficit in virtue of a prejudice on the part of a hearer that targets her social identity.<sup>31</sup>

A credibility deficit occurs when a hearer affords less credibility to a speaker than is warranted by the evidence that the speaker is offering the truth. A hearer has the relevant kind of identity prejudice when she has a prejudice against the speaker in virtue of the latter's membership in a certain social group.<sup>32</sup> Prejudice in the context of testimonial injustice is understood in terms of not being properly responsive to evidence. A prejudicial stereotype, for instance, is a generalization about a social group that fails to be sufficiently sensitive to relevant evidence.<sup>33</sup> Where this prejudice "tracks" the subject through different dimensions of social activity—economic, educational, professional, and so on—it is systematic, and the type that tracks people in this way is related to social identity, such as racial and gender identity. For instance, if a police officer rejects a woman's report of sexual assault merely because his sexism leads to him discrediting her, and despite evidence that she is being truthful, this would be a paradigmatic instance of testimonial injustice. In particular, the police officer's sexist beliefs manifest

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<sup>30</sup> Richard A. Leo and Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 440–41 (1998).

<sup>31</sup> See, e.g., MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER & THE ETHICS OF KNOWING 28 (2007). According to Fricker, "[A] speaker sustains . . . testimonial injustice if and only if she receives a credibility deficit owing to identity prejudice in the hearer; so the central case of testimonial injustice is identity-prejudicial credibility deficit." *Id.* (emphasis omitted).

<sup>32</sup> *But cf.* Elizabeth Anderson, *Epistemic Justice as a Virtue of Social Institutions*, 26 SOC. EPISTEMOLOGY 163 (2012) (identifying structural epistemic injustices, Anderson argues that some instances of testimonial injustice may have locally, non-prejudicial causes and require structural remedies). I am convinced by Anderson's arguments, and hence I do not think that all instances of testimonial injustice require a local, prejudicial origin. Nevertheless, I will, for the most part, grant this aspect of Fricker's view in what follows.

<sup>33</sup> FRICKER, *supra* note 31, at 34. According to Fricker, the prejudicial stereotypes that are relevant to testimonial injustice are those that also (i) have a negative valence, and (ii) stem from an "ethically noxious" motivation. *Id.* Both (i) and (ii) have been challenged on both empirical and philosophical grounds. See, e.g., Wade Munroe, *Testimonial Injustice and Prescriptive Credibility Deficits*, 46 CANADIAN J. OF PHIL. 924, 924 (2016). I will not focus on these stereotypes in what follows.



as a prejudice that targets the victim's gender identity in a way that causes her testimony to be regarded as less credible than the evidence supports.<sup>34</sup>

Miranda Fricker argues that when a hearer gives a speaker a credibility deficit because of her social identity, the speaker is wronged "in her capacity as a knower," and is thereby the victim of testimonial injustice.<sup>35</sup> For the purposes of this paper, I will focus entirely on Fricker's claim that only credibility deficits are relevant to this phenomenon, which is a claim that I will later challenge. Here, Fricker explicitly considers the question of whether credibility excesses can result in testimonial injustice, and denies that they can be, at least in the paradigmatic sense that is of interest to her.<sup>36</sup> She writes:

On the face of it, one might think that both credibility deficit and credibility excess are cases of testimonial injustice. Certainly there is a sense of 'injustice' that might naturally and quite properly be applied to cases of credibility excess, as when one might complain at the injustice of someone receiving unduly high credibility in what he said just because he spoke with a certain accent. At a stretch, this could be cast as a case of injustice as distributive unfairness—someone has got more than his fair share of a good—but that would be straining the idiom, for credibility is not a good that belongs with the distributive model of justice . . . those goods best suited to the distributive model are so suited principally because they are finite and at least potentially in short supply . . . . Such goods are those for which there is, or may soon be, a certain competition, and that is what gives rise to the ethical puzzle about the justice of this or that particular distribution. By contrast, credibility is not generally finite in this way, and so there is no analogous competitive demand to invite the distributive treatment.<sup>37</sup>

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<sup>34</sup> See also Kristie Dotson, *Tracking Epistemic Violence, Tracking Practices of Silencing*, 26 *HYPATIA* 236, 242 (2011) (citing PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* 69, 72–81 (2000)). Drawing on work by Patricia Hill Collins, Kristie Dotson focuses on a phenomenon very similar to testimonial injustice that she calls "testimonial quieting," which "occurs when an audience fails to identify a speaker as a knower." *Id.* She writes:

A speaker needs an audience to identify, or at least recognize, her as a knower in order to offer testimony. This kind of testimonial oppression has long been discussed in the work of women of color. Take as an example a popular analysis of black women's lack of credibility found in the work of Patricia Hill Collins. Collins claims that by virtue of her being a U.S. black woman she will systematically be undervalued as a knower. This undervaluing is a way in which Collins and other black women's dependencies as speakers are not being met. To undervalue a black woman speaker is to take her status as a knower to be less than plausible. One of Collins's claims is that black women are less likely to be considered competent due to an audience's inability to discern the possession of credibility beyond "controlling images" that stigmatize black women as a group.

*Id.* (citation omitted).

<sup>35</sup> FRICKER, *supra* note 31, at 20.

<sup>36</sup> *Id.* at 19–20.

<sup>37</sup> *Id.*

Fricker grounds her denial that credibility excesses can lead to testimonial injustice in her rejection of a distributive model of credibility.<sup>38</sup> In particular, she argues that credibility is not finite in a way that lends itself to a distributive treatment.<sup>39</sup> Consider, for instance, finite goods, such as wealth, land, or food. Not everyone can own twenty acres because there is only a limited amount of land to go around. For some to have a lot of it necessitates that others have a little, or none at all. But other goods don't limit one another in this way. To give moral praise to one person need not be to deny it to another. We can say equally of Abraham Lincoln, Ida B. Wells, and Martin Luther King Jr. that they are exceptional moral agents. In this way, there is an important sense in which moral praise is an infinite good: there is often enough of it to go around.

Credibility, according to Fricker, is like moral praise rather than like land: it is an infinite good.<sup>40</sup> If two friends tell me about their vacations this summer, believing that one of them snorkeled in Thailand need not impact my trusting that the other went hiking in Peru. I can give them both as much credibility as I like since not only is there plenty to go around, but giving some of it to one need not take any away from the other. Because of this, Fricker's view is that it is not unjust to give someone more credibility than is owed since this doesn't deprive someone else of a good that is deserved.<sup>41</sup>

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<sup>38</sup> See also José Medina, *The Relevance of Credibility Excess in a Proportional View of Epistemic Injustice: Differential Epistemic Authority and the Social Imaginary*, 25 *SOC. EPISTEMOLOGY* 15, 19 (2011). According to Medina, "Credibility is indeed not a finite good that can be in danger of becoming scarce in the same way that food and water can . . ." *Id.* Similarly, he writes:

The credibility excess assigned to some can be correlated to the credibility deficits assigned to others not because credibility is a scarce good (as the distributive model wrongly assumes), but because credibility is a comparative and contrastive quality, and an excessive attribution of it involves the privileged epistemic treatment of some (the members of the comparison class, i.e. those like the recipient) and the underprivileged epistemic treatment of others (the members of the contrast class, i.e. those unlike the recipient). An excessive attribution of credibility indirectly affects others who are, implicitly, unfairly treated as enjoying comparatively less epistemic trust. In my view, this is due to a disproportion in credibility and authority assigned to members of different groups. Credibility is not a scarce good that should be distributed with equal shares, but excesses and deficits are to be assessed by comparison with what is deemed a normal epistemic subject.

*Id.* at 20.

<sup>39</sup> See, e.g., FRICKER, *supra* note 31, at 19. Fricker argues that credibility is a concept that "wears its proper distribution on its sleeve." *Id.* For an argument against this, see Jennifer Lackey, *Credibility and the Distribution of Epistemic Goods*, in *BELIEVING IN ACCORDANCE WITH THE EVIDENCE: NEW ESSAYS ON EVIDENTIALISM* (Kevin McCain ed., 2018) (arguing that in many cases where credibility is finite, a distributive model is appropriate).

<sup>40</sup> FRICKER, *supra* note 31, at 19–20.

<sup>41</sup> *Id.*

### III. CREDIBILITY EXCESSES, FALSE CONFESSIONS, AND AGENTIAL TESTIMONIAL INJUSTICE

I began this paper by highlighting that the U.S. Supreme Court regards confession evidence as possibly the most powerful evidence of guilt admissible in court.<sup>42</sup> Yet we have seen that confessions are often acquired through coercion, manipulation, and deception, such as by presenting false evidence and using minimization tactics.<sup>43</sup> Vulnerable subjects, such as those who have been sleep deprived, juveniles, and the mentally impaired, are also frequently involved in the obtaining of false confessions.<sup>44</sup> What I now want to show is that when the testimony of a confessing self is privileged over a recanting self because of prejudice, whether racial or otherwise, a unique kind of testimonial injustice results that is due to a credibility excess.<sup>45</sup> This can be seen most clearly by focusing on several features of false confessions.

#### A. RESISTANCE TO COUNTEREVIDENCE

First, false confessions are *highly resistant to counterevidence*, which is a key feature of the prejudicial stereotypes often at work in instances of testimonial injustice. Despite awareness of the reality and prevalence of false confessions, as well as their causes and effects, false confessions are frequently taken to be sufficient grounding for convictions.<sup>46</sup> This occurs even when there is powerful evidence on behalf of defendants' innocence in particular cases and when the stakes simply couldn't be higher.<sup>47</sup> In a recent article showing how false confessions trump exculpatory DNA evidence, for instance, Sarah Appleby and Saul Kassin discuss the case of Juan Rivera, who was convicted of the rape and murder of an eleven-year-old girl in Waukegan, Illinois on the basis of his confession, even after DNA testing of

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<sup>42</sup> See Kassin et al., *supra* note 2, at 9.

<sup>43</sup> See *supra* Section I.

<sup>44</sup> Kassin et al., *supra* note 2, at 16.

<sup>45</sup> See generally Emmalon Davis, *Typecasts, Tokens, and Spokespersons: A Case for Credibility Excess as Testimonial Injustice*, 31 HYPATIA 485 (2016) (showing that typecasting, compulsory representation, and epistemic exploitation credibility excesses may result in testimonial injustice); Medina, *supra* note 38 (arguing that as belief is apportioned in accord with credibility relative to others in a testimonial context, credibility excess may give rise to testimonial injustice). Both Medina and Davis discuss the relationship between credibility excesses and testimonial injustice, but neither does so in relation to phenomena at all like false confessions.

<sup>46</sup> See *infra* pp. 53–54.

<sup>47</sup> See *infra* pp. 53–54.

semen at the scene excluded him.<sup>48</sup> “The state’s theory of why DNA belonging to someone other than the defendant was found in the victim was that the young girl had prior consensual sex with an unknown male, after which time Rivera raped her, failed to ejaculate, and then killed her.”<sup>49</sup> The fact that Rivera was convicted of the child’s murder shows that the state’s outrageous theory<sup>50</sup> was regarded by the jury as more credible than the possibility that he confessed to a crime he didn’t commit.<sup>51</sup> In other words, a single confession trumped evidence that would otherwise be taken to be decisively exculpatory. The most plausible explanation for this is that the false confession received a massive, unwarranted excess of credibility.

This is even more vivid when it is noticed that the totality of the evidence against confessions is often substantial, while the evidence in their favor is remarkably thin. Returning to the case of Juan Rivera, the evidence in favor of his innocence wasn’t only the DNA that excluded him, but also the fact that the state needed to construct an incredible theory to explain

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<sup>48</sup> Sarah C. Appleby & Saul M. Kassin, *When Self-Report Trumps Science: Effects of Confessions, DNA, and Prosecutorial Theories on Perceptions of Guilt*, 22 PSYCHOL., PUB. POL’Y, AND L. 127, 127 (2016).

<sup>49</sup> *Id.*

<sup>50</sup> As Jacqueline McMurtrie notes, “The unnamed-lover theory is used so often by prosecutors that it has its own moniker: ‘the unindicted co-ejaculator.’” Jacqueline McMurtrie, *The Unindicted Co-Ejaculator and Necrophilia: Addressing Prosecutors’ Logic-Defying Responses to Exculpatory DNA Result*, 105 J. CRIM. L. & CRIMINOLOGY 853, 855 (2015).

<sup>51</sup> I should note that this is not an isolated or anomalous occurrence. Here is another equally outrageous example:

[In] [t]he 2004 case of South Carolina against Billy Wayne Cope . . . Cope woke up one morning to find his 12-year-old daughter strangled to death in her bed. Police identified Cope as the perpetrator and interrogated him for several stressful hours during which time they told him that he failed a lie detector test and used other interrogation tactics that put innocent people at risk. After 2.5 days, Cope eventually confessed in a statement that was filled with contradictions and factual errors. Shortly thereafter, it was revealed that Cope’s daughter was also sexually assaulted. Subsequent DNA tests revealed that the semen and saliva found on the girl’s body did not match Cope, but it did match James Sanders, a serial sex offender who had broken into other homes in the area as well. One would think from this series of events that Cope would have been released from jail, freed, and compensated. Instead, however, the prosecutor—armed with a police-induced confession that did not match the facts of the crime and with no evidence of a link between the two men—charged Cope with conspiracy and theorized that he had pimped his daughter out to Sanders. On the basis of this theory, the jury convicted both Cope and Sanders. Cope’s conviction was recently affirmed at the state level; in 2014, the U.S. Supreme Court refused to grant Cope’s request for an appeal.

Appleby & Kassin, *supra* note 48, at 129 (citations omitted). Moreover, in 2010, the Center on Wrongful Convictions “identified 19 cases in which confessors to rape and/or murder were tried and convicted despite having been excluded by DNA tests of key biological materials.” *Id.* at 128.

this.<sup>52</sup> He was also a nineteen-year-old former special education student, who had been questioned by detectives for four days, during which he steadfastly denied any knowledge of the crime.<sup>53</sup> Around midnight on the fourth day, after the interrogators became accusatory:

He broke down, and purportedly nodded when asked if he had raped and killed [the eleven-year-old girl]. The interrogation continued until 3:00 a.m., when investigators left to type a confession for Rivera to sign. Minutes later, jail personnel saw him beating his head against the wall of his cell in what was later termed a psychotic episode. Nevertheless, within a few hours, Rivera signed the typed confession that the investigators had prepared. The document, a narrative account of what the investigators claimed Rivera told them, was so riddled with incorrect and implausible information, that Lake County State's Attorney Michael Waller instructed investigators to resume the interrogation in an effort to clear up the inconsistencies. On October 30, despite Rivera's obvious fragile mental condition, the interrogation resumed, resulting in a second signed confession, which contained a plausible account of the crime.<sup>54</sup>

Because of trial errors and post-conviction DNA testing, Rivera had three separate jury trials and was found guilty and sentenced to life in prison on all three occasions.<sup>55</sup> It wasn't until the Center on Wrongful Convictions became involved that the Illinois Appellate Court ruled in 2012 that Rivera's conviction was "unjustified and cannot stand," and thus that the state would dismiss all charges.<sup>56</sup> Rivera had served nineteen years in prison.<sup>57</sup>

If we look at the case of Rivera, the extent to which his false confession was given an excess of credibility is not only undeniable, it is shocking. To see this, notice that knowledge is taken to be incompatible with the presence of different kinds of counterevidence called *defeaters*, which can be either *doxastic* or *normative*, and either *rebutting* or *undercutting*.<sup>58</sup> A doxastic

<sup>52</sup> *Juan Rivera Time Served: 19 Years*, THE INNOCENCE PROJECT, [hereinafter *Rivera Time Served*], <https://www.innocenceproject.org/cases/juan-rivera> [<https://perma.cc/FY62-FM3S>].

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *People v. Rivera*, 962 N.E.2d 53, 67 (Ill. App. Ct. 2011).

<sup>57</sup> *Id.*

<sup>58</sup> There are various views of defeaters, approached in a number of different ways. *See generally* ROBERT AUDI, *EPISTEMOLOGY: A CONTEMPORARY INTRODUCTION TO THE THEORY OF KNOWLEDGE* (1998); LAURENCE BONJOUR, *THE STRUCTURE OF EMPIRICAL KNOWLEDGE* (1985); LAURENCE BONJOUR & ERNEST SOSA, *EPISTEMIC JUSTIFICATION: INTERNALISM VS. EXTERNALISM, FOUNDATIONS VS. VIRTUES* (2003); RODERICK M. CHISHOLM, *THEORY OF KNOWLEDGE* (3rd ed. 1989); ALVIN I. GOLDMAN, *EPISTEMOLOGY AND COGNITION* (1986); JOHN HAWTHORNE, *KNOWLEDGE AND LOTTERIES* (2004); JENNIFER LACKEY, *LEARNING FROM WORDS: TESTIMONY AS A SOURCE OF KNOWLEDGE* (2008); John McDowell, *Knowledge by Hearsay*, in *KNOWING FROM WORDS* 195 (Bimal Krishna Matilal & Arindam Chakrabarti eds., 1994); ALVIN PLANTINGA, *WARRANT AND PROPER FUNCTION* (1993); JOHN POLLOCK, *CONTEMPORARY THEORIES OF KNOWLEDGE* (1986); MICHAEL WILLIAMS, *GROUNDLESS*

defeater is a doubt or belief that you have that indicates that one of your beliefs is either false (i.e., rebutting) or unreliably formed or sustained (i.e., undercutting). A normative defeater is similar, except it concerns doubts or beliefs that you *should have*, given the evidence available to you. So, for example, if I believe that the animal in my backyard is a bobcat by seeing one there, I might get powerful evidence that such a belief is false by you telling me that bobcats have never lived in my state, or that my basis is a poor one by my optometrist reporting to me how much my vision has deteriorated. If I accept both instances of testimony, then I have doxastic defeaters, rebutting in the first case, undercutting in the second. But even if I doubt or deny the testimony in question, I am still responsible for this counterevidence if I reject it for no good reason at all. Why? Because it is evidence that I *should have*.<sup>59</sup> The justification that my bobcat belief might have initially enjoyed, then, has been normatively defeated.

These tools can help us see the extent to which Rivera's false confession was given a massive excess of credibility over the course of decades and by people at every stage of the process—including police officers, prosecutors, and jurors—that resulted in a distinct form of testimonial injustice. Given all of the research discussed above, Rivera was, first and foremost, a prime candidate for providing a false confession: he was a special education student who had endured multiple lengthy interrogations, was sleep-deprived, and was shown to be in the middle of a psychotic episode.<sup>60</sup> Moreover, Rivera's original confession was riddled with inaccuracies and implausible information.<sup>61</sup> All of this, by itself, should challenge the reliability of Rivera as a source of information about his guilt. In other words, those accepting Rivera's confession had undercutting defeaters (whether doxastic or normative), since they had evidence that clearly showed that their beliefs that Rivera raped and murdered the eleven-year-old child were unreliably formed or sustained. That is, they had evidence that the source of their beliefs about

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BELIEF: AN ESSAY ON THE POSSIBILITY OF EPISTEMOLOGY (2nd ed. 1999); Robert Audi, *The Place of Testimony in the Fabric of Knowledge and Justification*, 34 AM. PHIL. Q. 405 (1997); Michael Bergmann, *Internalism, Externalism and the No-Defeater Condition* 110 SYNTHESIS 399 (1997); Laurence Bonjour, *Externalist Theories of Epistemic Justification*, 5 MIDWEST STUD. IN PHIL. 53 (1980); Tyler Burge, *Content Preservation*, 102 PHIL. REV. 457 (1993); Tyler Burge, *Interlocution, Perception, and Memory*, 86 PHIL. STUD. 21 (1997); Elizabeth Fricker, *Against Gullibility*, in KNOWING FROM WORDS 125 (Bimal Krishna Matilal & Arindam Chakrabarti eds., 1994); Elizabeth Fricker, *The Epistemology of Testimony*, Supp. Vol. 61 PROC. OF THE ARISTOTELIAN SOC. 57 (1987); Baron Reed, *Epistemic Circularity Squared? Skepticism about Common Sense*, 73 PHIL. & PHENOMENOLOGICAL RES. 186 (2006).

<sup>59</sup> See Sanford Goldberg, *Should Have Known*, 194 SYNTHESIS 2863 (2015) (providing development of the notion of *should have known*).

<sup>60</sup> *Rivera Time Served*, *supra* note 52.

<sup>61</sup> *Id.*

Rivera's guilt—namely, Rivera himself—was not reliable under the interrogation conditions in question. But they also had doxastic rebutting defeaters since the DNA evidence excluded him as a source of the semen at the scene of the crime, thereby calling into question the truth of their beliefs that he was guilty of the crimes.

When one has a defeater of any kind, the only way in which the target belief can be rationally retained is if one has a *defeater-defeater*—that is, a further belief or evidence that defeats the original belief or evidence.<sup>62</sup> So, for instance, the rebutting defeater for my bobcat belief might itself be defeated if I come to learn that a bobcat recently escaped from the local zoo. Or the undercutting defeater might be defeated if I discover that my optometrist consulted the wrong chart when concluding that my vision is unreliable. But notice: there is simply no way in which the State's incredible theory in which the eleven-year-old was sexually active with some unknown male, and Rivera didn't ejaculate despite raping her, successfully works as a defeater-defeater here. In other words, there is no interpretation of the available evidence that makes this theory *more plausible* than the alternative one: namely, that Rivera falsely confessed under duress to a crime he didn't commit.

That false confessions are resistant to counterevidence is further supported by looking at the sheer number of instances of testimony that often need to be discounted in order to retain belief in the correctness of a corresponding conviction. Consider, for analogy, how the testimony of victims of sexual assault is often rejected or discounted because of bias or prejudice,<sup>63</sup> but how numbers can sometimes add up to tip the balance.<sup>64</sup> So, for instance, a handful of girls and women accusing Larry Nassar of sexual harassment or assault wasn't enough for many to believe them, but when over 300 women came forward, the public started to side with their word over his denials.<sup>65</sup> We saw something similar in the case of Bill Cosby, where sixty

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<sup>62</sup> LACKEY, *supra* note 58.

<sup>63</sup> See e.g., Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 1–2 (2017) (discussing credibility discounting as actionable discrimination).

<sup>64</sup> It is instructive to compare this point to Charles Mills' discussion of the testimony of blacks: "At one point in German South-West Africa, white settlers demanded 'that in court only the testimony of seven African witnesses could outweigh evidence presented by a single white person.'" Charles Mills, *White Ignorance*, in RACE AND EPISTEMOLOGIES OF IGNORANCE 11, 32 (Shannon Sullivan & Nancy Tuana eds., 2007) (quoting MARK COCKER, RIVERS OF BLOOD, RIVERS OF GOLD: EUROPE'S CONFLICT WITH TRIBAL PEOPLES 317 (1998)).

<sup>65</sup> David Eggert & Ed White, *Michigan State Reaches \$500M Settlement for 332 Victims of Larry Nassar*, CHI. TRIB. (May 16, 2018), <https://www.chicagotribune.com/sports/college/>

women reported being victimized at the hands of the once respected comedian and actor.<sup>66</sup> Now while this involves the addition of new testifiers, we can see a structurally similar problem at work in false confessions. A confessing self often reports guilt only once—under conditions of coercion, manipulation, deception, sleep deprivation, stress, and so on—while a recanting self reports innocence hundreds, even thousands of times, often over a period of years. And yet despite this, the one report of guilt utterly swamps the thousands of reports of innocence, with no justification for this radical asymmetry in treatment of confession versus recantations. This provides another lens through which we can see that false confessions are highly resistant to counterevidence.<sup>67</sup>

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ct-spt-michigan-state-larry-nassar-settlement-20180516-story.html [https://perma.cc/TU5M-29CX].

<sup>66</sup> Carly Mallenbaum et al., *A Complete List of the 60 Bill Cosby Accusers and Their Reactions to His Prison Sentence*, USA TODAY (Apr. 27, 2018), <https://www.usatoday.com/story/life/people/2018/04/27/bill-cosby-full-list-accusers/555144002/> [https://perma.cc/5MQT-3MW5].

<sup>67</sup> While cases involving false confessions raise unique and interesting issues, related concerns arise when an *accusing self* receives a credibility excess, while a recanting self receives a credibility deficit. For instance, when a witness provides testimony that accuses a defendant of a crime, it is often massively privileged over a later recantation, even when the original accusation is the sole or primary evidence on behalf of guilt and the recantation is supported by corroborating evidence. Christopher J. Sinnott, *When Defendant Becomes the Victim: A Child's Recantation as Newly Discovered Evidence*, 41 CLEV. ST. L. REV. 569, 574–78 (1993) [hereinafter Sinnott, *When Defendant Becomes the Victim*]; see also Shawn Armbrust, *Reevaluating Recanting Witnesses: Why the Red-Headed Stepchild of New Evidence Deserves Another Look*, 28 B.C. THIRD WORLD L. J. 75, 75 (2008) [hereinafter Armbrust, *Reevaluating Recanting Witnesses*]. Legal scholars have noted the credibility deficit attached to recanting testimony, pointing to a general judicial skepticism that “has become so universal that it appears to have given rise to an inference that recantation evidence is not trustworthy and should be treated as such absent the movant’s ability to persuade otherwise” Sinnott, *When Defendant Becomes the Victim* at 574–75 (1993). This is supported by the fact that the recantation of testimony of key witnesses is widely disregarded by courts, with the view of the Court of Appeals of New York in 1916 often cited by way of support: “There is no form of proof so unreliable as recanting testimony. In the popular mind it is often regarded as of great importance. Those experienced in the administration of the criminal law know well its untrustworthy character.” *People v. Shilitano*, 112 N.E. 733, 736 (N.Y. 1916); see Armbrust, *Reevaluating Recanting Witnesses* at 75.

However, the very reasons revealing that this suspicion regarding recantation testimony involves an unwarranted credibility deficit also point toward the illegitimate credibility excess that the accusing testimony receives. To see this, the first point to note is that most of the considerations on behalf of discounting recantations cut both ways and provide no reason for a general preference for the original testimony of accusing selves. For instance, (1) recantations are thought to reveal the untrustworthiness of the witness; (2) fears are expressed that the witness has recanted under duress or because of coercion; (3) close relationships between defendants and witnesses are cited as reason for skepticism; and (4) worries about the court being manipulated are expressed. Armbrust, *Reevaluating Recanting Witnesses* at



## B. FINITE NATURE OF CREDIBILITY

Second, false confessions reveal how credibility can be finite and thus how its proper distribution is crucial for assessing whether a speaker is the victim of testimonial injustice. Typically, when we talk about distributing credibility, we have in mind doing so across different people. If a woman says she was assaulted and the accused assailant denies this, then the question is: which person do we believe? But in cases of false confessions, we are

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82. While Armbrust discusses three other reasons why recantations are discounted, none support the radical asymmetrical treatment of accusations and recantations by courts. *Id.* at 83–87. But notice that each of these could equally be invoked to call into question the reliability of the accusation in the first place. If providing inconsistent testimony, for instance, undermines the witness’s credibility, this does not favor the earlier time over the later one. Moreover, at the original trial, witnesses can testify under duress or because of coercion, can have a close relationship with the defendant, and can be manipulating the court. To the extent that these considerations raise concerns about reliability, accusations and recantations should be in the same boat. Yet courts systematically treat them not only differently, but radically so. *Id.* at 78.

Further support on behalf of the claim that accusations receive an unwarranted credibility excess can be seen by highlighting that accusations are preferred, even when the original testimony is offered by vulnerable witnesses prone to fear or intimidation, and their later adult selves recant with very plausible explanations for why they were dishonest in the first place. *Id.* at 95–96. For instance, in a very well-known case, Cathleen Crowell Webb, at the age of sixteen, accused Gary Dotson in 1977 of abducting and raping her. *Id.* at 75–76. Eight years later, while married and riddled with guilt, she recanted her testimony, admitting that she fabricated the accusation out of fear of a possible pregnancy at that time. *Id.* at 76. Despite her maturation, and the very plausible explanation of the unreliability of her original testimony, the judge found that Webb’s trial testimony was more credible than her recantation at an evidentiary hearing that Dotson requested. *Id.* Eventually, in 1989, Dotson became the first person in the United States to be exonerated on the basis of DNA evidence. *Id.* at 76–77. One way to understand why an accusation of a frightened juvenile was massively privileged over that of a secure, adult woman—especially when a man’s freedom was on the line—is that the accusing self was given an unwarranted credibility excess.

That such credibility excesses are resistant to evidence is made vivid by considering the following statement by Judge Seabury in *Shilitano*, challenging recantations:

Bearing in mind that the witnesses to crimes of violence are often of a low and degraded character and that after they have given their testimony they are sometimes influenced by bribery and other improper considerations, it is evident that the establishment of a rule which left the power to grant a new trial to a defendant to depend upon recantation by such witnesses would be subversive of the proper administration of justice.

112 N.E. at 735. There are at least two problems with what Judge Seabury says in this passage: first, the wholesale rejection of recantations seems to be driven by prejudice regarding witnesses to crimes of violence, whom he describes as having a “low and degraded character.” *Id.* Second, everything that is said here should cut both ways, as (i) the same witnesses offering the recantation also provided the original accusing testimony, and (ii) witnesses can similarly be subject to bribery and improper considerations at both times. *Id.* Once again, the most plausible explanation for the general and widespread privileging of accusing testimony is that courts systematically give it a significant and unwarranted credibility excess.

talking about distributing credibility across different times in the life of the same person. There is the earlier, confessing self and the later, recanting self. The question then becomes, which self do we believe: the earlier one or the later one?

Of course, the mere fact that two people or selves disagree, even about matters of fact, does not by itself require that credibility be finite between them. I may tell you that a local restaurant is open while someone else tells you it's not. That we offer competing reports here does not require that only one of us be deemed worthy of trust or belief: you can be credible, even if wrong on a particular occasion, and I can lack credibility, even if right in a one-off case. Many disagreements are the product of innocent mistakes or lack of information, and so there can still be enough credibility to go around.

But not all disagreements are like this. It's precisely when someone's credibility itself is on the line that its finitude rears its head. False confessions provide the clearest case here: when someone confesses to murder and then recants shortly thereafter, there are no errors or gaps in evidence to explain the disagreement away. To give credibility to the confessing self is ipso facto to deny it to the recanting self. Credibility becomes scarce.<sup>68</sup> What this shows is that false confessions uniquely pit one against oneself, and reveal how an excess in credibility can lead to an egregious kind of testimonial injustice.<sup>69</sup>

### C. AGENTIAL TESTIMONIAL INJUSTICE

Third, by virtue of the state saying that the reality described by the confessor in cases of false confessions—one that is reported only through coercion, manipulation, deception, sleep deprivation, and so on—represents her truest self, *the confessor's status as a knower is reduced to what she reports only under conditions devoid of, or with diminished, epistemic agency*. This is especially problematic since the question of whether one is a murderer can literally be a matter of life and death. So, while it is true that the recanter—the later self who accurately, consistently, and steadfastly describes a different reality that is not extracted through coercion,

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<sup>68</sup> See Lackey, *supra* note 39, at 145 (developing idea that credibility becomes scarce); see also Jennifer Lackey, *Pitted Against Yourself: Credibility and False Confessions*, BLOG AM. PHIL. ASS'N (Apr. 21, 2016), <https://blog.apaonline.org/2016/04/21/pitted-against-your-self-credibility-and-false-confessions/> [https://perma.cc/D75N-LCB7].

<sup>69</sup> While I have here focused on earlier-self credibility excesses, it should be clear that similar considerations apply to later selves. Suppose, for instance, that a false "memory" of abuse is coercively extracted by people in power to serve their purposes, and the testimony of this "later self" is given an excess of credibility in virtue of bias against her social identity. This would be an example of a later-self credibility excess, with a corresponding form of testimonial injustice.

manipulation, or deception—is wronged in being afforded a massive credibility deficit, there is a unique and powerful epistemic wrong done to the earlier self who receives a credibility excess. 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.<sup>70</sup>

There is an instructive parallel here: in ancient Athens, the testimony of enslaved persons, who were the property of their masters or the state, was typically inadmissible in judicial proceedings except under torture. As Michael Gagarin writes, “One of the most criticized features of classical Athenian law is the bizarre institution of . . . ‘interrogation under torture.’ A well-known rule held that in most cases the testimony of slaves was only admissible in court if it had been taken under torture, and in the surviving forensic speeches the orators frequently . . . praise the practice as most effective.”<sup>71</sup> Just as Athenian courts regarded the testimony of enslaved persons as reliable only when obtained via torture—and thus offered under conditions devoid of epistemic agency—so, too, do our courts privilege the testimony of confessing selves, even when confessions are extracted through interrogation techniques that undermine or compromise our epistemic agency. This is especially problematic when the confessing selves are vulnerable members of society, such as juveniles and those with developmental impairments, and when the credibility excesses are fueled by prejudice, such as racism and sexism.<sup>72</sup>

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<sup>70</sup> See Lauren Leydon-Hardy, *Predatory Grooming and Epistemic Infringement*, in *APPLIED EPISTEMOLOGY* (Jennifer Lackey ed., forthcoming 2020) (discussing a distinctive kind of epistemic wrong that targets the epistemic agency of knowers).

<sup>71</sup> Michael Gagarin, *The Torture of Slaves in Athenian Law*, 91 *CLASSICAL PHILOLOGY* 1, 1 (1996).

<sup>72</sup> Similarly, Edward Peters discusses the legal revolution that took place in Europe in the twelfth century that shaped European criminal jurisprudence until the end of the eighteenth century. EDWARD PETERS, *TORTURE* 41 (1985). One of the consequences of this legal revolution is that “confession was elevated to the top of the hierarchy of proofs, so elevated, in fact, that jurists called confessions ‘the queen of proofs.’” *Id.* Moreover, it is precisely because confessions were taken to be such compelling evidence of guilt, and torture was regarded as a reliable means of acquiring true confessions, that torture became so integrated into the European criminal justice system of this time. Peters writes:

For all the uncertainties that attended the gathering and weighing of evidence, the testimony of witnesses, and the unpredictability of judges and juries, confession provided a remedy, and in some cases, chiefly capital ones, it came to be required. It is the importance of confession upon which hinges, if not the revival, then surely the spread and integration of torture into the legal systems of the thirteenth century.

*Id.* at 44.

We might take a step back here, then, and identify an interestingly different sort of testimonial injustice, one that is grounded in unwarranted credibility excesses afforded to speakers when their epistemic agency has been denied or subverted in the obtaining of their testimony. Let's call the excess given in such cases *non-agential*, which can give rise to the corresponding *agential testimonial injustice*. Agential testimonial injustice is extraordinarily vivid in cases of false confessions that have been extracted in various ways, but testimony obtained in ways that deny epistemic agency is not limited to such cases. Many abusive relationships, for instance, involve coercion of various degrees, including in testimonial contexts, and when what is reported under such conditions is unjustifiably privileged, one is the victim of this kind of testimonial injustice. Imagine, for instance, a woman testifying that her partner has never been abusive while he is sitting next to her in an interrogation room, but she then retracts this once she is able to extricate herself from his control. If the former testimony is weighed far more heavily than the latter for no good reason, particularly when one is aware of the broader context of the abuse, this would be an instance of what I call agential testimonial injustice.

It is worth developing in a bit more detail the precise nature of two different epistemic wrongs involved in this kind of testimonial injustice. The first kind of wrong is the one highlighted above, which specifically involves the excess of credibility given to the extracted testimony. Here, one is epistemically wronged by virtue of being regarded as a testifier—a giver of knowledge—only when one's testimony is extracted and is thus the product of a process that subverts one's epistemic agency. This can be seen both by the weight that the confession is given relative to other evidence and, specifically, the privileging of the confessing testimony over the recanting testimony.

The second kind of epistemic wrong involved in agential testimonial injustice results from *the very act of extracting testimony from a speaker in a way that subverts her epistemic agency*. This can happen in different ways. The clearest and most extreme case is where the extraction, such as the interrogation tactics in question, leads subjects to believe in the truth of their own reports, either wholly or partially. For instance, Saul Kassin and Lawrence Wrightsman characterize "coerced-internalized" false confessions as those in which "innocent but malleable suspects, told that there is incontrovertible evidence of their involvement, come not only to capitulate in their behavior but also to believe that they may have committed the crime

in question, sometimes confabulating false memories in the process.”<sup>73</sup> In cases of coerced-internalized false confessions, then, both one’s testimony and one’s doxastic states have come under the will of another. By virtue of employing techniques that are coercive, manipulative, and deceptive, interrogators here are able to alienate a suspect from her own epistemic resources and bring about beliefs that are disconnected from her epistemic agency.<sup>74</sup>

These cases of coerced-internalized false confessions quite straightforwardly involve this second epistemic wrong. To see this, notice that epistemic agency is commonly understood as requiring a subject’s responsiveness to reasons or evidence.<sup>75</sup> On a strong reading of this, I exercise my epistemic agency with respect to my belief that *p* when my belief that *p* is responsive to reasons. When interrogators are able to manipulate not only the testimony of suspects, but their doxastic states as well, they are quite clearly interfering with the reasons-responsiveness of the suspects’ beliefs. This results in a clear instance of the second epistemic wrong involved in agential testimonial injustice since a subject’s epistemic agency is being subverted in the obtaining of her confession.

But even when subjects don’t internalize their own guilt, and thus continue to believe in their innocence despite saying otherwise, there is an important sense in which their epistemic agency is compromised in the *extraction* of their testimony. To make this clear, let’s look at a couple of cases where a speaker reports what she herself does not believe but in a way that does not at all interfere with her epistemic agency.

Consider, first, lying—where a speaker states that *p*, believes that *p* is false, and states that *p* with the intention to be deceptive with respect to whether *p*.<sup>76</sup> Even though a liar aims to be deceptive in her reports, this does not at all interfere with her *ability* to be responsive to reasons in her beliefs or her testimony. Indeed, a liar might even be a *responsible* epistemic agent

<sup>73</sup> Kassin et al., *supra* note 2, at 15; see also SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *Confession Evidence*, in THE PSYCHOL. OF EVIDENCE AND TRIAL PROC. 64 (1985).

<sup>74</sup> Coerced-internalized false confessions are an example of what Leydon-Hardy calls epistemic infringement. See Leydon-Hardy, *supra* note 70.

<sup>75</sup> See e.g., Pamela Hieronymi, *Responsibility for Believing*, 161 SYNTHÈSE 357 (2008) (providing a reasons-responsiveness account of doxastic responsibility according to which voluntariness is not required for responsibility); Conor McHugh, *Epistemic Responsibility and Doxastic Agency*, 23 PHIL. ISSUES 132 (2013) (arguing that the central condition on responsibility is reasons-responsiveness and believers can satisfy this condition only because they are doxastic agents).

<sup>76</sup> See Jennifer Lackey, *Lies and Deception: An Unhappy Divorce*, 73 ANALYSIS 236, 237 (2013).

regarding her doxastic states, despite the fact that her statements aim away from the truth. Consider, next, cases of *selfless assertion*,<sup>77</sup> where there are three components to this phenomenon: first, a subject, for purely non-epistemic reasons, does not believe that *p*; second, despite this lack of belief, the subject is aware that *p* is very well supported by all of the available evidence; and, third, because of this, the subject asserts that *p* without believing that *p*. A classic case of a selfless assertion is where a Creationist teacher correctly reports that *Homo Sapiens* evolved from *Homo erectus* to her students, even though she doesn't believe this herself. Here, the reported belief in question is resistant to counterevidence, and so the belief itself is at least not properly responsive to reasons. Nevertheless, the reporting of the selfless assertion does not in any way violate the speaker's epistemic agency and, in fact, is grounded in it. In particular, the speaker in such cases fails to report what she herself believes, but she does so for straightforwardly epistemic reasons. In this way, she is appropriately sensitive to reasons, not with respect to her own beliefs, but with respect to her testimony. On my view, then, selfless assertions straightforwardly reflect epistemic agency.

Let's now turn to the case of extracted testimony. For instance, Kassin discusses "compliant false confessions," which are "those in which suspects are induced through interrogation to confess to a crime they did not commit."<sup>78</sup> "In these cases, the suspect acquiesces to the demand for a confession to escape a stressful situation, avoid punishment, or gain a promised or implied reward."<sup>79</sup> Here, even if the beliefs of the suspects are responsive to reasons, this is utterly disconnected from the obtaining of their testimony. Unlike in the case of selfless assertions, for instance, where the offering of the reports is precisely what is grounded in the responsiveness to reasons, the tactics used to extract the confessions—coercion, manipulation, deception—subvert the epistemic agency of the suspects. Thus, such speakers are the victim of this second kind of epistemic wrong involved in agential testimonial injustice.

#### D. SOCIAL IDENTITY PREJUDICE

Finally, recall that Fricker's conception of testimonial injustice focuses specifically on credibility deficits that result from prejudices targeting a

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<sup>77</sup> See LACKEY, *supra* note 58 (developing the phenomenon of selfless assertion in relation to the norm governing assertion); see also Jennifer Lackey, *Norms of Assertion*, 41 *NOÛS* 594 (2007) (arguing that cases of selfless assertion show that knowledge cannot be the norm governing assertion).

<sup>78</sup> Kassin et al., *supra* note 2, at 14.

<sup>79</sup> *Id.*

speaker's social identity, such as race or gender.<sup>80</sup> We might ask, then, what social identity is relevant in cases of false confessions, especially since it is not only members of underrepresented groups that are victims of the sort of credibility excess at issue in agential testimonial injustice. By way of response, notice that Fricker's conception of social identity is unnecessarily narrow. While race and gender are certainly highly relevant to the credibility that speakers are given across many different contexts, there are other aspects of social identity that are important here as well, such as socioeconomic status, occupation, and so on. For instance, many people in the workplace find themselves on a hierarchy where those at the top are given more credibility than those lower down, even in areas that are entirely disconnected from their areas of expertise. In a hospital, physicians might be believed over nurses about questions that do not pertain to medicine, and if this happens regularly, and simply in virtue of professional status, it seems correct to say that the nurses are victims of testimonial injustice. Similarly, members of groups associated with delinquency, deviance, or moral deficiency, such as "criminals," "prisoners," or even "suspects" are frequently the targets of systematic prejudice. A criminal record, for instance, presents a major barrier to employment,<sup>81</sup> the label of "prisoner" or "ex-con" is highly stigmatized,<sup>82</sup> and offenders tend to be demonized as dangerous, dishonest, and disreputable.<sup>83</sup> Moreover, Edwin Meese III famously said in 1985, while he was Attorney General of the United States, "you don't have many suspects who are innocent of a crime. That's contradictory. If a person is innocent of a crime, then he is not a suspect."<sup>84</sup> Thus, a plausible explanation is that a

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<sup>80</sup> See *supra* Section II.

<sup>81</sup> See, e.g., DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN THE ERA OF MASS INCARCERATION* (2009) (arguing that a criminal record provides a significant barrier to legitimate work).

<sup>82</sup> See David J. Harding, *Jean Valjean's Dilemma: The Management of Ex-Convict Identity in the Search for Employment*, 24 *DEVIANT BEHAV.* 571, 572–77 (2003) (showing how formerly incarcerated people manage their criminal identities in relation to employment); Paul J. Hirschfield & Alex R. Piquero, *Normalization and Legitimation: Modeling Stigmatizing Attitudes Toward Ex-Offenders*, 48 *CRIMINOLOGY* 27 (2010) (examining public attitudes toward people who are formerly incarcerated); Thomas P. LeBel, *Perceptions of and Responses to Stigma*, 2 *SOC. COMPASS* 409 (2008) (exploring stigma and attitudes toward the stigmatized).

<sup>83</sup> See KATHLYN TAYLOR GAUBATZ, *CRIME IN THE PUBLIC MIND* (1995) (examining how Americans conceive of crimes, those who commit them, and appropriate penalties for them); JOCK YOUNG, *THE EXCLUSIVE SOCIETY: SOCIAL EXCLUSION, CRIME AND DIFFERENCE IN LATE MODERNITY* (1999) (exploring three forms of exclusion—economic exclusion, social exclusion between people in society, and exclusionary policies and practices of the criminal justice system).

<sup>84</sup> Howard Kurtz, "Meese Says Few Suspects Are Innocent of Crime," *WASH POST* (Oct. 11, 1985), <https://www.washingtonpost.com/archive/politics/1985/10/11/meese-says-few-sus>

confession triggers in others the belief that the confessor is thereby a “criminal,” and this is at least one of the social identities targeted in cases of false confessions. Of course, this can combine with other prejudices, such as those involving race, ethnicity, and socioeconomic status. But even in the absence of these prejudices, confessions can lead to egregious acts of testimonial injustice.

Agential testimonial injustice thus involves a testifier suffering two epistemic wrongs, both through the process by which the testimony is extracted and by virtue of the credibility excess it receives. I now turn to why confessing selves might be given a credibility excess in the first place. And it is crucial to address this question, as convictions based largely on false confessions can’t be explained simply by pointing to the fact that recanting selves receive a credibility deficit. In many cases, if you subtract the confession, you lose the conviction, too.<sup>85</sup> So, for instance, even if a defendant’s testimony of innocence at a later time is rejected, what is often also needed to convince a jury of his guilt is the veracity of the original confession. Put bluntly, calling the recanter a liar isn’t enough for a conviction—the confessor also needs to be regarded as a truth-teller.

#### IV. WHY ARE CONFESSIONS PRIVILEGED?

The first, and perhaps most obvious, reason why the testimony of confessors is privileged is that most of us find it very difficult to imagine ourselves confessing to something we didn’t do and so we conclude that the suspect must be guilty. This is especially compelling when a violent crime is at issue, such as murder. The problem with this is that there is ample psychological research showing otherwise. For instance, in a well-known experiment by Saul Kassin and Katherine Kiechel, 69% of college students who were falsely accused of causing a computer to crash by pressing a key that they were told to avoid signed a confession.<sup>86</sup> When false evidence of guilt is presented, this percentage is even higher, and it is not uncommon for suspects to come to believe in their own guilt, either fully or partially.<sup>87</sup> A recent study by Robert Nash and Kimberly Wade used digital editing

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pects-are-innocent-of-crime/272c4d16-f627-4ce4-896e-7faf8632a526/ [https://perma.cc/BLD9-69SA].

<sup>85</sup> Consider, again, the case of Tankleff discussed above: “*Solely on the basis of that confession, Tankleff was convicted, only to have his conviction vacated and the charges dismissed 19 years later.*” Kassin et al., *supra* note 2, at 18 (emphasis added) (first citing FIRSTMAN & SALPETER, *supra* note 19; then citing Lambert, *supra* note 19, at B1).

<sup>86</sup> Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125, 126–27 (1996).

<sup>87</sup> *Id.* at 127.



software to fabricate evidence of participants “stealing” money from a “bank” during a computerized gambling experiment.<sup>88</sup> When presented with this evidence, *all* of the subjects signed the confession form, with 63% fully internalizing the act and 20% partially internalizing the act.<sup>89</sup> The authors concluded that “a combination of social demand, phoney evidence and false suggestion from a credible source can lead a substantial number of people to falsely confess and believe they committed an act they never did.”<sup>90</sup> This phenomenon can be seen in the case of Michael Crowe, whose sister was stabbed to death in her bedroom.<sup>91</sup>

After a series of interrogation sessions, during which time police presented Crowe with compelling false physical evidence of his guilt, he concluded that he was a killer, saying: ‘I’m not sure how I did it. All I know is I did it.’ Eventually, he was convinced that he had a split personality—that ‘bad Michael’ acted out of a jealous rage while ‘good Michael’ blocked the incident from memory. The charges against Crowe were later dropped when a drifter in the neighborhood that night was found with [his sister’s] blood on his clothing.<sup>92</sup>

Another reason we favor the confessor over the recanter is that false confessions affect the perceptions of others, including eyewitnesses, alibi witnesses, and forensic experts. In one study, 61% of those who had witnessed a staged theft changed their identifications after learning that certain lineup members had confessed.<sup>93</sup> In another study, only 45% of participants maintained their support of an alibi for a suspect after being told that she confessed to stealing money, a number that dropped to 20% when the experimenter suggested that their support might imply their complicity with the alibi.<sup>94</sup> What this data shows is that false confessions not only mislead in the first instance, they also beget additional misleading evidence downstream. When this is combined with how counterintuitive false confessions seem to many, including to judges and jurors, conditions become optimal for wrongful convictions.

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<sup>88</sup> Robert A. Nash & Kimberly A. Wade, *Innocent but Proven Guilty: Eliciting Internalized False Confessions Using Doctored-Video Evidence*, 23 *APPLIED COGNITIVE PSYCHOL.* 624, 625 (2009).

<sup>89</sup> *Id.* at 629.

<sup>90</sup> *Id.*

<sup>91</sup> Kassir et al., *supra* note 2, at 15.

<sup>92</sup> *Id.* (citing Steven A. Drizin & Beth A. Colgan, *Tales from the Juvenile Confession Front*, in *INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT* 127 (G. Daniel Lassiter ed., 2004)).

<sup>93</sup> See Lisa E. Hasel & Saul M. Kassir, *On the Presumption of Evidentiary Independence: Can Confessions Corrupt Eyewitness Identifications?*, 20 *PSYCHOL. SCI.* 122, 122 (2009).

<sup>94</sup> See Stéphanie B. Marion et al., *Lost Proof of Innocence: The Impact of Confessions on Alibi Witnesses*, 40 *L. & HUM. BEHAV.* 65, 65 (2016).

Of particular relevance for our purposes here is that there is reason to believe that racial prejudice or bias is at work in convictions based on false confessions. Andrew Taslitz explains what happens when the interrogation techniques we discussed earlier are used in conjunction with racial discrimination:

Now when we add race to the mix, the picture becomes clearer. Officers start with a presumption of the guilt of a young black male based upon one-sided and limited circumstantial evidence. The kid reacts with hostility and defensiveness. These reactions, combined with his powerless speech patterns, lead police to believe he is lying. They close off alternative theories, heightening the pressure on the kid about whose guilt they are now convinced. They make real evidence sound more inculpatory than it is, they deceive him into believing there is still more inculpatory evidence against him, they appeal to his self-interest, and they hammer away at him for hours. Young, isolated, cut off from family and friends, fearful, and rightly seeing no way out, he confesses. Falsely.

Should the youth take the stand at a suppression hearing, the judge, drawing on the same racially-stigmatizing images of black youth, won't believe him. The case goes to trial, and the jury likely sees a film just of his confession . . . the same defensiveness and linguistic barriers that made the kid seem to be a liar to the police prod the jury toward a similar conclusion. And the same stereotypes of black criminality and duplicity again favor jurors accepting the truthfulness of the confession rather than of its retraction.<sup>95</sup>

Given that 85% of juvenile exonerees who falsely confessed are African American,<sup>96</sup> there is further reason to conclude that racism is a significant factor when looking at why confessing selves are given a credibility excess.

Finally, the practical interests of those most responsible for securing justice often lead them, intentionally or unintentionally, to weigh confessions far too heavily, to disregard exculpatory evidence, and to rely on incredible theories to support their conclusions. This is often seen in the case of prosecutors, who can be blindly driven by a desire to “win.” For instance, in a widely ridiculed interview on an episode of *60 Minutes*, “Chicago: The False Confessions Capital,” then State’s Attorney Anita Alvarez discussed the case of the “Dixmoor Five” in which DNA evidence ruled out five defendants who had falsely confessed to the rape and murder of a fourteen-year-old girl.<sup>97</sup> Moreover, the semen found inside the fourteen-year-old matched Willie Randolph, who was a convicted rapist with thirty-nine

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<sup>95</sup> Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. OF CRIM. L. 121, 131–32 (2006).

<sup>96</sup> *Id.* at 122.

<sup>97</sup> James Harden, THE NATIONAL REGISTRY OF EXONERATIONS (last updated June 21, 2019), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3838> [<https://perma.cc/2RXW-6XV4>].

arrests. After serving a total of ninety-five years behind bars, all five were exonerated in 2011, and in 2013 the Illinois State Police settled a civil rights case brought on their behalf for a record \$40 million.<sup>98</sup> Despite all of this, when asked about this case in a 2015 interview, Alvarez still said that it was possible that the five defendants raped and murdered the girl, and that Randolph wandered past the field where her body was and committed an act of necrophilia.<sup>99</sup> Since the total evidence overwhelmingly tells against this outrageous theory, the most plausible explanation is that Alvarez was motivated by her practical interests, which she thinks will be served by refusing to admit mistakes by her office. Of course, we see this same phenomenon outside the courtroom as well. Climate change deniers will massively privilege one scientist's testimony over that of thousands of others because it suits their purposes, as do voters with the testimony of their preferred candidates for office. When such credibility excesses are driven by prejudices, they clearly result in acts of testimonial injustice.

#### CONCLUSION

In this paper, I have argued that false confessions provide a unique, compelling, and practically urgent case in which an excess in credibility results in a distinctive kind of testimonial injustice. This reveals not only that credibility can, in fact, be finite, and that its proper distribution is often of critical importance—indeed, it can literally be the difference between life and death—but also that in privileging earlier, confessing selves over later, recanting selves, the state often reduces the confessor to a knower only insofar as she is devoid of epistemic agency. In doing so, the state is quite straightforwardly saying to its citizens—you are worthy of being believed only when we undermine your epistemic agency and extract information from you through coercive or manipulative methods. That this is a particularly pernicious form of testimonial injustice, carried out by institutions in which we place our trust, cries out for a radical change in the epistemic lens through which we view confessions in the criminal justice system.

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<sup>98</sup> *Id.*

<sup>99</sup> Eric Zorn, *Cook County State's Attorney Alvarez Humiliates Herself on National TV*, CHI. TRIB.: CHANGE OF SUBJECT (Dec. 9, 2012), [http://blogs.chicagotribune.com/news\\_columnists\\_ezorn/2012/12/cook-county-states-attorney-alvarez-humiliates-herself-on-national-tv.html](http://blogs.chicagotribune.com/news_columnists_ezorn/2012/12/cook-county-states-attorney-alvarez-humiliates-herself-on-national-tv.html) [https://perma.cc/RX63-77ZX].