NOTE

PREVENTING THE EPISTEMIC HARM OF TESTIMONIAL INJUSTICE IN LAY WITNESS CREDIBILITY ASSESSMENTS

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ABSTRACT

Our legal system's recognition of injustice is incomplete. Epistemic injustice—injustice that inflicts harm on an individual's capacity to possess knowledge—has gone largely undiscussed. One form of epistemic injustice is testimonial injustice, or harm to a person's capacity as a knower of information. This harm is distinct from a more general credibility harm. It refers to harm that damages an individual's perception of their own knowledge and experiences, and whether they feel as if they have the epistemic and communicative tools to convey that information. These concepts have been more commonly applied to ordinary epistemic practices, such as everyday conversations, making sense of social experiences, or democratic institutions. Yet their application in the law is less common. This Note seeks to join scholars like Jasmine B. Gonzales Rose and S. Lisa Washington by importing an epistemic injustice lens into legal analyses. In doing so, this Note focuses on lay witness testimony, which plays an essential role in determining the veracity and value of plaintiffs' legal claims. Yet misplaced narratives and improperly wielded cross-examination strategies may cause witnesses to suffer testimonial injustice through testimonial quieting or testimonial smothering. Epistemic harm, as it is inflicted in lay witness testimony, is worsened by a pernicious power imbalance between marginalized and nonmarginalized groups.

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Nonetheless, our legal system is capable of recognizing and preventing the epistemic harm caused by testimonial injustice. This Note draws from academic conceptions of epistemic harm and testimonial injustice to paint a broader picture of how testimonial injustice manifests in lay witness testimony. Then, this Note applies these conceptions to employment discrimination lawsuits brought under Title VII of the Civil Rights Act, specifically sex discrimination cases brought by LGBTQ+ litigants. In doing so, this Note will examine Justice Gorsuch's opinion in Bostock v. Clayton County*, particularly the facts in its companion case,* R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, to identify testimonial injustice. Finally, this Note concludes by introducing legal and nonlegal proposals aimed at preventing the epistemic harm of testimonial injustice. This Note's overarching goal is to contribute to a more justice-oriented legal profession that is better equipped to recognize harm and remedy injustice.*

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INTRODUCTION

The U.S. legal system intends to promote justice and remedy injustice, yet its recognition of injustice is incomplete.[1] Our legal system does not recognize a distinct kind of injustice—epistemic injustice, which inflicts harm on a person's credibility and on their perceived capacity to be credible.[2] Epistemology[3] and Feminist Legal Theory[4] seek to develop a conception of epistemic harm that describes its impact on people who hold one or more subordinate statuses in society. This Note specifically addresses the epistemic harm of testimonial injustice. Testimonial injustice occurs when a speaker's credibility is diminished by a listener because of that listener's prejudices or implicit biases.[5] While some scholars have applied the lens of epistemic harm and testimonial injustice to everyday epistemic practices, as observed in social interactions[6] and democratic institutions,[7] the concept continues to be more thoroughly translated and applied to our legal system. Jasmine Gonzales Rose has contributed significantly to this task by identifying epistemic problems posed by racialized factfinding.[8] Building upon Gonzales Rose's foundation, this Note recognizes that our legal system is far from being able to assess and provide appropriate remedies for epistemic harm. Nonetheless, this Note takes necessary steps toward that end.

Our legal system is capable of recognizing injustices and attempting to remedy their harms, and advocates have implored the legal system to do so in

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[1] *Cf.* READINGS IN THE PHILOSOPHY OF LAW 14-15 (Keith C. Culver & Michael Giudice, eds., 3d ed. 2017).

[2] *See* MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 4 (2007).

[3] *See id.* ("[T]he project of this book is to home in on two forms of epistemic injustice that are distinctively epistemic in kind, theorizing them as consisting, most fundamentally, in a wrong done to someone specifically in their capacity as a knower.").

[4] *See, e.g.*, CATHARINE A. MACKINNON, ONLY WORDS 13 (1993) ("Social inequality is substantially created and enforced—that is, *done*—through words and images. Social hierarchy cannot and does not exist without being embodied in meanings and expressed in communications."); Rae Langton, *Speech Acts and Unspeakable Acts*, 22 PHIL. & PUB. AFFS. 293, 298-99 (1993) ("The ability to perform speech acts of certain kinds can be a mark of political power. To put the point crudely: powerful people can generally do more, say more, and have their speech count for more than can the powerless.").

[5] *See* FRICKER, *supra* note 2, at 4.

[6] *See, e.g.*, Veronica Ivy (formerly Rachel McKinnon), *Allies Behaving Badly: Gaslighting as Epistemic Injustice*, *in* THE ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE 167, 167-68 (Ian James Kidd, José Medina & Gaile Pohlhaus, Jr. eds., 2017). To clarify, Dr. Veronica Ivy changed her name from Rachel McKinnon to Veronica Ivy on December 4, 2019. Dr. Veronica Ivy (@SportIsARight), TWITTER (Dec. 4, 2019, 3:37 PM), https://web.archive.org/web/20220615233725/https://twitter.com/sportisaright/status/1202326061343805440.

[7] *See, e.g.*, JOSÉ MEDINA, THE EPISTEMOLOGY OF RESISTANCE: GENDER AND RACIAL OPPRESSION, EPISTEMIC INJUSTICE, AND THE SOCIAL IMAGINATION 3-5 (2013).

[8] *See generally* Jasmine B. Gonzales Rose, *Race, Evidence, and Epistemic Injustice*, *in* PHILOSOPHICAL FOUNDATIONS OF EVIDENCE LAW (Christian Dahlman, Alex Stein & Giovanni Tuzet eds., 2021) [hereinafter Gonzales Rose, *Race, Evidence, and Epistemic Injustice*].

the past—even when the legal system often responds slowly, subtly, and inadequately.[9] The epistemic harm of testimonial injustice is no exception. Before our legal system can address testimonial injustice through appropriate measures or remedies, legal actors must first understand and be prepared to recognize this form of injustice.

This Note will draw from conceptions of epistemic harm and testimonial injustice to analyze a few instances where testimonial injustice occurs within our legal system and how it harms marginalized people.[10] These injustices will then be analyzed from legal, ethical, and normative perspectives to contribute to a more comprehensive approach to addressing testimonial injustice in our legal system. These perspectives offer the legal system important lessons for understanding epistemic injustice and its harm to marginalized people and the legal system at large. This Note analyzes witness testimony of marginalized people facing workplace discrimination to identify practices of testimonial injustice. Moreover, this Note argues that some legal rules governing the admissibility of witness testimony as evidence at trial may enable testimonial injustice's pervasive harm to marginalized people.

Witness testimony is a cornerstone of how our legal system determines the veracity and value of legal claims. Witness testimony is offered to convey a person's knowledge of their experiences as it relates to a given case.[11] It also plays a larger role in epistemic communities as a foundation for knowledge.[12] Often, witness testimony is offered in several forms: by a primary party to a case, such as a civil plaintiff or criminal defendant; by someone else with relevant knowledge of the events in question, such as a bystander or family member; or by an expert in a given field, such as a forensic scientist in a criminal case or a coastal geologist in a beachfront property ownership dispute.[13] Generally, witnesses may be identified as lay witnesses, expert witnesses, or

[9] *See, e.g.*, City of Pineville v. Moore, 227 S.W. 477, 477-79 (Ky. 1921). *Moore* was a school desegregation lawsuit brought by Black taxpayers following the City of Pineville's consolidation of separate Black and white boards of education and subsequent failure to levy taxes to support Black schools. *Id.* at 477. John Moore sued as a "citizen, taxpayer, and a patron of the colored schools of Pineville" to demand support for Black education, and the lower court directed the City to levy the tax. *Id.* On appeal, the court generally affirmed the idea that white taxpayers could, in some instances, be taxed to support Black schools, but the court nonetheless found that the levy was "too late." *Id.* at 479; *see also* CAMILLE WALSH, RACIAL TAXATION: SCHOOLS, SEGREGATION, AND TAXPAYER CITIZENSHIP, 1869-1973, at 52 (2018). Thus, while the court recognized the injustice, it held that the remedy available at law was not appropriate in that instance. *Moore*, 227 S.W. at 479. I credit Steven Dean and his seminar, Taxation and Racial Capitalism, for introducing me both to this case and to Camille Walsh's scholarship.

[10] *See infra* Part I.

[11] Conversely, evidentiary "[r]ules of reliability seek to ensure that the evidence the jury hears is as good as it purports to be—or at least that its defects are apparent to the jury." GEORGE FISHER, EVIDENCE 2 (3d ed. 2012).

[12] Jonathan E. Adler, *Testimony, Trust, Knowing*, 91 J. PHIL. 264, 264-65 (1994).

[13] *See* FED. R. EVID. 601-603.

character witnesses.[14] Here, the focus is on lay witnesses—the most common of the three.[15] Lay witnesses are people "who watched certain events and describe[] what they saw."[16] For some people, testifying is a storytelling moment because it is an "opportunity to tell *their* story," where that opportunity might not exist otherwise.[17] Testifying can be both crucial and traumatizing.[18]

Federal and state rules of evidence—whether formal, like the Federal Rules of Evidence,[19] or informal, like the common law collected in the Massachusetts Guide to Evidence[20]—play a key role in determining the admissibility, relevance, and usefulness of witness testimony in a given case, and often to the administration of justice. The complex layers of rules and practices governing permissible witness testimony operate as gatekeepers by determining the qualities or characteristics witnesses must possess for their evidence to be seen and valued by the factfinder. In doing so, the rules of evidence grant attorneys and judges power to control whether a given audience—such as the jury—is willing and capable of hearing the witness.[21] This power imbalance can create testimonial injustice and inflict epistemic harm through, for example, practices of silencing where a witness is deemed to not be a credible knower of information.[22] Under the rules of evidence, this may simply be seen as impeaching a witness's credibility. As this Note recognizes, however,

[14] *Discovery*, OFFS. OF THE U.S. ATT'YS, U.S. DEP'T OF JUST., https://www.justice.gov/usao/justice-101/discovery [https://perma.cc/C2L9-PYNN] (last visited Apr. 18, 2023).

[15] *Id.*

[16] *Id.* Expert witnesses are called to testify because of their knowledge in a certain area and are only able to testify about their knowledge of that area to the extent relevant to the case. *Id.* Character witnesses are often people who knew someone involved in a case and are called to testify about their knowledge of that person's personality or what kind of a person they are. *Id.*

[17] S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1109-10 (2022).

[18] *See, e.g.*, *id.* at 1146 ("Much has been said about subpoenaing a survivor of domestic violence to testify in criminal court against her (former) partner. For example, Professor Linda Mills argues that forcing survivors to testify in criminal court under the threat of incarceration may have a 'terrorizing' effect." (footnote omitted)); *id.* ("In family regulation cases, . . . [s]urvivors who do not wish to testify against their current or ex-partner find themselves in a particularly vulnerable situation. Not only are they at risk of being held in contempt of court, with consequences ranging from monetary sanctions to incarceration, they also risk having their testimony used against them.").

[19] *See generally* FED. R. EVID.

[20] *See generally* MASS. GUIDE TO EVID.

[21] Kristie Dotson, *Tracking Epistemic Violence, Tracking Practices of Silencing*, 26 HYPATIA 236, 238 (2011) ("[T]o communicate, *we all need an audience willing and capable of hearing us*. The extent to which entire populations of people can be denied this kind of linguistic reciprocation as a matter of course institutes epistemic violence.").

[22] *See* CATHARINE A. MACKINNON, *Toward Feminist Jurisprudence*, *in* TOWARD A FEMINIST THEORY OF THE STATE, *reprinted in* READINGS IN THE PHILOSOPHY OF LAW, *supra* note 1, at 227, 228-29 ("Those with power in civil society, not women, design its norms and institutions, which become the status quo.").

testimonial injustice plays a much more harmful role when a witness is deemed not to be credible. Thus, their testimony, as it occurs in trial, is often "chopped up" to feed lawyers' arguments and judges' reasoning.

This Note will show that witness testimony is particularly vulnerable to testimonial injustice, as exemplified by the injustice seen in employment discrimination cases brought under Title VII. Next, this Note will argue that by understanding epistemic and testimonial injustice, lawyers and judges will become more capable of recognizing harm and correcting injustice. Part I provides relevant background information and descriptions of epistemic harm and testimonial injustice, illustrated through examples. Then, Part II connects epistemic harm and testimonial injustice to employment discrimination lawsuits brought under Title VII's prohibition against sex discrimination and analyzes what is lost by failing to consider vulnerabilities in witness testimony caused by testimonial injustice—as well as what could be gained by considering testimonial injustice. Finally, Part III poses several questions that may assist attorneys and judges in addressing the harm caused by testimonial injustice. This Note concludes by proposing possible reforms to rules of evidence and lawyering practices to reinforce witness credibility and pursue epistemic justice where witnesses might otherwise be silenced. This Note's broader goal is to contribute to a foundation that will enhance efforts to build a more justice-oriented legal practice.

I. EPISTEMIC HARM CAUSED BY TESTIMONIAL INJUSTICE

Broadly speaking, one significant mission of the U.S. legal system is to pursue justice by remedying injustice. Yet that mission has fallen short. This Note highlights the legal system's failure to recognize and remedy epistemic injustice.[23] This Part will explain epistemic harms caused by testimonial injustice, articulate its relevance to the legal profession, and introduce how it is prevalent in Title VII employment discrimination lawsuits. The ability to recognize and understand these concepts is one step toward the larger project of combatting the epistemic harm of testimonial injustice.

[23] *See, e.g.*, Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 166 [hereinafter Crenshaw, *Demarginalizing*] ("If any real efforts are to be made to free Black people of the constraints and conditions that characterize racial subordination, then theories and strategies purporting to reflect the Black community's needs must include an analysis of sexism and patriarchy. Similarly, feminism must include an analysis of race . . . ."); Dean Spade, *Intersectional Resistance and Law Reform*, 38 SIGNS 1031, 1034 (2013) ("In the absence of explicit, intentional exclusion, courts rarely find a violation of discrimination law. Proving that harm was intentional and based on race can be exceptionally difficult, especially when multiple vectors of subjection exist for the affected person or people.").

A. *Epistemology and Epistemic Injustice*

Epistemology is a branch of philosophy that seeks to understand knowledge.[24] It explores what it means to know, and how knowledge is good for us.[25] One species of knowledge involves a person's knowledge of facts.[26] Facts are generally regarded as true statements about something (for example, someone describing what they are wearing today, the weather outside, or where they have hidden something).[27] Another species of knowledge involves "how our degrees of confidence are rationally constrained by our evidence."[28] The term "evidence" is analytically different in epistemology and law. In law, evidence is "[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence [or nonexistence] of an alleged fact."[29] By contrast, in epistemology, evidence is much broader: one articulation identifies evidence as "the kind of thing which can make a difference to what one is *justified* in believing or . . . what is *reasonable* for one to believe."[30] Epistemological study explores what conditions are necessary for someone to know a given fact and what constitutes a fact at all.[31] These discussions, along with countless others, are beyond the scope of this Note even though they may offer novel insights about knowledge creation in the law.

For example, consider Angie. Angie knows some facts about swimming, but she does not know how to swim. Angie watches the Summer Olympics every four years and has gathered that swimming involves kicking your legs, pulling your arms, and breathing regularly. She also knows that Katie Ledecky is exceptional at it.[32] The facts that Angie knows about swimming are supported

[24] David A. Truncellito, *Epistemology*, INTERNET ENCYC. OF PHIL., https://iep.utm.edu/Epistemo/ [https://perma.cc/PFC2-M9J7] (last visited Apr. 18, 2023).

[25] Matthias Steup & Ram Neta, *Epistemology*, STAN. ENCYC. OF PHIL. (Apr. 11, 2020), https://plato.stanford.edu/entries/epistemology [https://perma.cc/96EJ-NP9E] (describing Plato's epistemology). Similarly, John Locke and Immanuel Kant pursued epistemology to study human understanding. *See id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* "Evidence" in this section is not referring to legal evidence. It refers to a more general sense of evidence.

[29] *Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[30] Thomas Kelly, *Evidence*, STAN. ENCYC. OF PHIL. (July 28, 2014), https://plato.stanford.edu/entries/evidence [https://perma.cc/C73Y-ZCME]; *see also* Jaegwon Kim, *What Is "Naturalized Epistemology?*," 2 PHIL. PERSPS. 381, 390-91 (1988) ("In any event, the concept of evidence is inseparable from that of justification. When we talk of 'evidence' in an epistemological sense we are talking about justification: one thing is 'evidence' for another just in case the first tends to enhance the reasonableness or justification of the second.").

[31] For an overview of these conditions, see Steup & Neta, *supra* note 25 (detailing conditions in section entitled "Knowing Facts").

[32] *Katie Ledecky*, TEAM USA, https://www.teamusa.org/usa-swimming/athletes/katie-ledecky [https://perma.cc/2LTR-7ZC7] (last visited Apr. 18, 2023) (detailing Ledecky's ongoing successes in her swimming career).

by the evidence that she has gathered while watching others swim. But, despite her knowledge of these facts, Angie does not know how to swim.[33] Her confidence in—or knowledge of—being able to swim is constrained by a lack of evidence, in an epistemological sense. Here, her lack of evidence is a lack of experience with actually swimming or being taught to swim.[34] In legal evidentiary terms relevant to witness testimony in court, Angie would have to be an expert at swimming or have direct personal experience with swimming in order to testify about swimming.[35]

The way that evidence constrains knowledge creation and maintenance in an epistemological way parallels how the law employs evidence to create an understanding of issues in court. The admission or exclusion of evidence at trial to establish an "objective" or "true" set of facts is one of many examples. Evidence admitted at trial and the weight of that evidence shapes how the judge, jury, and public understand and value the case.[36] An opinion issued by a judge and a verdict reached by a jury come from places of systemic authority. These determinations profess an understanding of the facts of a case, and thus make a claim of knowledge not only about those facts but about how they should be interpreted in light of the law to be applied. Where these determinations go unexamined, judicial decision-making may amount to discrimination.[37]

For example, imagine a slip-and-fall case where an injured plaintiff, Josie, has sued a defendant homeowner, Violet, for an injury that she sustained at Violet's swimming pool. At trial, Josie may call her friend, Tom, who was also at Violet's swimming pool that day, to testify. Tom is only able to testify about his firsthand knowledge or perception of the events as he observed them.[38] Presumably, Tom's testimony should help the factfinder fulfill their responsibility to determine a true set of facts before the law can be applied. Here, the set of facts to be determined is whether Josie was actually injured at Violet's swimming pool. On cross-examination, however, Violet may attempt to impeach Tom's

[33] *See, e.g.*, Steup & Neta, *supra* note 25 (illustrating similar hypothetical where knowing *how* is different from knowing *that* (e.g., knowing *how* to swim is different from knowing *that* swimming requires actions like kicking, breathing, and pulling)). Similarly, knowing facts about someone is not the same as knowing someone. *See id.*

[34] *See id.*

[35] *See* FED. R. EVID. 601-603.

[36] *See supra* notes 21-22 and accompanying text.

[37] *See* Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1726 (2000) ("[I]nstitutional analysis brings into view important features of the judges' nonintentional decision-making processes—their reliance on scripts, their dependence on paths.").

[38] *See* FED. R. EVID. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony."); FED. R. EVID. 701 ("If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge . . . .").

credibility to show that he might not be a reliable witness.[39] Let's say, for example, Violet knows that Tom has limited eyesight and needs glasses. She might ask Tom whether he was wearing his glasses that day. And, if he was not, how could he be sure that he saw Josie injure herself? Here, cross-examination enables Violet to make Tom appear to be a less reliable source of knowledge for determining whether the plaintiff was injured at the defendant's swimming pool.[40] Thus, the factfinder's perception of the witness testimony is highly dependent upon their own credibility assessments of witnesses. This example previews how witness credibility is assessed and often discredited during the broader attempt at building a set of facts in a case. It also shows how those facts may be obscured by harmful credibility assessments.

More recently, scholars have continued inquiries akin to the examples above by incorporating how a person's identities and interests affect their perceptions.[41] For example, a person's access to knowledge about how to swim or their interpretation of that knowledge about swimming may be affected by their identities: age, educational attainment, country of residence, gender, and race.[42] Relatedly, in the practice of law, a witness's willingness to testify at trial may vary depending on their identities, in part due to an underlying risk of, or increased vulnerability to, epistemic injustice. For example, a survivor of domestic violence may be rightfully hesitant or unwilling to come forward as a witness to share their experiences with assault or abuse. The degree of a survivor's hesitation or unwillingness to testify may also vary significantly

[39] *How Courts Work: Steps in a Trial: Cross-Examination*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/crossexam/ [https://perma.cc/3483-94L4].

[40] *See* FED. R. EVID. 607 ("Any party, including the party that called the witness, may attack the witness's credibility."); FED. R. EVID. 608 ("A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness . . . .").

[41] *See, e.g.*, Crenshaw, *Demarginalizing*, *supra* note 23, at 166. More specifically, intersectional-feminist philosophers have been incorporating various identities into their theories. *See id.* at 140.

[42] *See* Gitanjali Saluja, Ruth A. Brenner, Ann C. Trumble, Gordon S. Smith, Tom Schroeder & Christopher Cox, *Swimming Pool Drownings Among US Residents Aged 5-24 Years: Understanding Racial/Ethnic Disparities*, 96 AM. J. PUB. HEALTH 728, 731 (2006); Francesca Borgonovi, Helke Seitz & Irina Vogel, *Swimming Skills Around the World: Evidence on Inequalities in Life Skills Across and Within Countries* 8-10 (OECD Soc. Emp. & Migration Working Paper No. 281, 2022), https://www.oecd-ilibrary.org/docserver/0c2c8862-en.pdf [https://perma.cc/C67A-8QUX]; *Drowning Prevention: Drowning Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drowning/facts/index.html [https://perma.cc/8WPQ-HQ4C] (last updated Oct. 7, 2022); *see also* Niki McGloster, *This Woman Is Shattering an Age-Old Stereotype About Black People & the Water*, REFINERY29 (July 1, 2020, 3:45 PM), https://www.refinery29.com/en-us/noelle-singleton-afroswimmers-black-swimmers [https://perma.cc/7ELM-98NZ] (featuring Noelle Singleton, her story, and her organization AfroSwimmers, "a swim movement that offers lessons and aquatic wellness services for people of color" and "shar[es] the stories of Black women who are reclaiming joy").

depending on their identities. In Deborah Tuerkheimer's book, *Credible: Why We Doubt Accusers and Protect Abusers*, she engages with Kimberlé Crenshaw's conception of intersectionality to document the increased credibility discount faced by women of color who are survivors of sexual assault and are considering speaking out against their abusers.[43] "Whether an accuser is Black or Latinx, Asian American or Muslim—all this and more inform how her credibility is judged."[44] Prejudices held by factfinders often discount the credibility of some witnesses more than others based on the identities they hold.[45] Credibility assessments of witnesses, particularly witnesses with marginalized or underrepresented identities, harm the witness's capacity as a knower of information, rendering them particularly vulnerable to epistemic harm.

This functional exploration of epistemology both in and out of the law allows us to explore epistemic injustice and its pervasiveness in the legal profession. Epistemic injustice is a dimension of discrimination because it "excludes the subject from trustful conversation" and thus "marginalizes the subject in her participation in the very activity that steadies the mind and forges an essential aspect of identity."[46] In *Epistemic Injustice: Power and the Ethics of Knowing*, Miranda Fricker identifies testimonial injustice as a distinct form of epistemic injustice.[47] Testimonial injustice inflicts harm on a speaker in their capacity as a knower.[48] According to Fricker, "[t]estimonial injustice occurs when prejudice causes a hearer to give a deflated level of credibility to a speaker's word."[49] For

[43] DEBORAH TUERKHEIMER, CREDIBLE: WHY WE DOUBT ACCUSERS AND PROTECT ABUSERS 21 (2021). A "credibility discount," according to Tuerkheimer, is when people doubt a person's authority to assert facts, functioning as "credibility judgments that work to the detriment of people who lack social power." *Id.* at 9. Tuerkheimer writes further that "credibility is meted out too sparingly to women, whether cis or trans, whatever their race or socioeconomic status, their sexual orientation or immigration status." *Id.*

[44] *Id.* at 21.

[45] *See* Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 264 (1996) (summarizing cases where prosecutors argue that juries should disregard witnesses because of their race and arguing for exploration of role that race and credibility play in legal cases); Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 4 (2000) (arguing there is "'Demeanor Gap' in situations of cross-racial demeanor evaluation that undermines accuracy in credibility determinations").

[46] FRICKER, *supra* note 2, at 53-54.

[47] *Id.* at 1. Hermeneutical injustice is also a form of epistemic injustice that Fricker identifies. Hermeneutical injustice "occurs at a prior stage, when a gap in collective interpretive resources puts someone at an unfair disadvantage when it comes to making sense of their social experiences." *Id.*

[48] *See id.*

[49] *Id.* "The basic idea is that a speaker suffers a testimonial injustice just if prejudice on the hearer's part causes him to give the speaker less credibility than he would otherwise have given." *Id.* at 4.

example, a police officer may not believe a suspect in a criminal investigation because they are Black.[50]

> [A]ny epistemic injustice wrongs someone in their capacity as a subject of knowledge, and thus in a capacity essential to human value; and the particular way in which testimonial injustice does this is that a hearer wrongs a speaker in his capacity as a giver of knowledge, as an informant.[51]

Kristie Dotson further expands on this foundational conception of epistemic injustice by analyzing epistemic violence articulated in Gayatri Chakravorty Spivak's description of "the reality that members of oppressed groups can be silenced by virtue of group membership."[52] Dotson writes that "one method of executing epistemic violence is to damage a given group's ability to speak and be heard."[53]

In the broader context of nonlegal testimony, it is necessary to recognize and understand the dependent relationship that exists between speakers and hearers/listeners. Reciprocity in linguistic or communicative exchanges represents the idea that speakers are vulnerable because they "require [their] audiences to 'meet' their effort 'halfway' in a linguistic exchange."[54] Reciprocity is important because, as Jennifer Hornsby explains:

> When there is reciprocity among people, they recognize one another's speech as it is meant to be taken: An audience who participates reciprocally does not merely understand the speaker's words but also, in taking the words as they are meant to be taken, satisfies a condition *for the speaker's having done the communicative thing that she intended*.[55]

Thus, a "successful linguistic exchange"—i.e., the success of a speaker's attempt to communicate—ultimately depends on the audience.[56] An audience must be "willing and capable" of hearing the speaker for the speaker to communicate their testimony.[57]

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[50] *Id.* at 1.

[51] *Id.* at 5.

[52] Dotson, *supra* note 21, at 236. Dotson goes further to explain that epistemic violence "in testimony is a refusal, intentional or unintentional, of an audience to communicatively reciprocate a linguistic exchange owing to pernicious ignorance." *Id.* at 238.

[53] *Id.* at 236.

[54] *Id.* at 238. Consider, for example, Dr. Christine Blasey Ford's testimony before the Senate Judiciary Committee about now-Justice Brett Kavanaugh's alleged sexual assault of her. Sarah Clark Miller illustrates how Dr. Blasey Ford's testimony placed her in a vulnerable epistemic position. Sarah Clark Miller, *Beyond Silence, Toward Refusal: The Epistemic Possibilities of #MeToo*, 19 FEMINISM & PHIL. 12, 13 (2019) (exploring epistemic possibilities of survivors' mass informal disclosure of sexual assault).

[55] Jennifer Hornsby, *Disempowered Speech*, 23 PHIL. TOPICS 127, 134 (1995) (emphasis added).

[56] *See* Dotson, *supra* note 21, at 237 (quoting Hornsby, *supra* note 55, at 134).

[57] *Id.* at 238.

Dotson identifies two types of silencing as "epistemic violence,"[58] which translate to broader arguments made herein about vulnerability to testimonial injustice in witness testimony: testimonial quieting and testimonial smothering.[59] Testimonial quieting occurs "when an audience fails to identify a speaker as a knower. A speaker needs an audience to identify, or at least recognize, her as a knower in order to offer testimony."[60] In *Black Feminist Thought*, for example, Patricia Hill Collins shows that Black women are historically and systemically undervalued as knowers.[61] The persistence of controlling stereotypes about Black women renders the identity of being a Black woman as an epistemically disadvantaged identity.[62] Testimonial smothering occurs "because the speaker perceives one's immediate audience as unwilling or unable to gain the appropriate uptake of proffered testimony."[63] Kimberlé Crenshaw explains that women of color have historically been coerced into testimonial smothering because "people of color often must weigh their interests in avoiding issues that might reinforce distorted public perceptions against the need to acknowledge and address intracommunity problems."[64]

Another articulation of testimonial injustice that lacks the "reciprocity" required to complete a successful linguistic exchange is "gaslighting."[65] A recent episode in the Red Table Talk series covered gaslighting in the public sphere and everyday life, and defined it as "psychological manipulation and emotional abuse in which a person's reality is doubted."[66] In Veronica Ivy's article, *Allies*

[58] Dotson's conception of epistemic violence is not perfectly equivalent to Fricker's conception of epistemic injustice. *Compare id.*, *with* FRICKER, *supra* note 2, at 1. For example, Dotson incorporates the idea of "pernicious ignorance" as an essential element of epistemic violence that Fricker does not include. *See* Dotson, *supra* note 21, at 238; FRICKER, *supra* note 2, at 4. However, both articulations come together to illustrate testimonial injustice and epistemic harm to witness testimony.

[59] Dotson, *supra* note 21, at 237.

[60] *Id.* at 242.

[61] PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 254 (2d ed. 2000).

[62] *See id.*

[63] Dotson, *supra* note 21, at 244. Dotson also articulates three circumstances that routinely exist in instances of testimonial smothering: "1) the content of the testimony must be unsafe and risky; 2) the audience must demonstrate testimonial incompetence with respect to the content of the testimony to the speaker; and 3) testimonial incompetence must follow from, or appear to follow from, pernicious ignorance." *Id.*

[64] Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1256 (1991) [hereinafter Crenshaw, *Mapping the Margins*].

[65] Ivy, *supra* note 6, at 167; *see also* Cynthia A. Stark, *Gaslighting, Misogyny, and Psychological Oppression*, 102 MONIST 221, 221 (2019) (developing concept of manipulative gaslighting, "the systematic denial of women's testimony about harms done to them by men, which is *aimed at undermining those and other women*").

[66] Red Table Talk, *What Is Gaslighting? Could It Be Happening to You?*, FACEBOOK, at 10:38 (Sept. 21, 2022, 12:00 PM), https://www.facebook.com/538649879867825/videos/780147793313463.

Behaving Badly: Gaslighting as Epistemic Injustice, she defines gaslighting, in terms more familiar to this argument, as "where a listener doesn't believe, or expresses doubt about, a speaker's testimony."[67] Ivy goes on to explain why gaslighting, as a method of discounting speaker credibility, can be understood as a kind of epistemic and testimonial injustice.[68] Gaslighting can be subtle and unintentional but nonetheless harmful.[69] Gaslighting as testimonial injustice begins when a listener does not believe or doubts a speaker's testimony.[70]

> In this epistemic form of gaslighting, the listener of testimony raises doubts about the speaker's reliability at perceiving events accurately. Directly, or indirectly, then, gaslighting involves expressing doubts that the harm or injustice that the speaker is testifying to really happened as the speaker claims.[71]

Ivy provides a helpful illustration of this phenomenon. Victoria, a trans woman, is being repeatedly misgendered[72] by one of her male coworkers, James, at their holiday work party.[73] When Victoria approaches her colleague, Susan, to complain about James misgendering her, Susan responds by claiming that Victoria must have "misheard him" and that James would not do that because "[h]e won a university diversity award for his supporting queer issues."[74] Finally, Susan tells Victoria, "[y]ou say that he's done it before, and maybe he has, but *I've* never heard him do it before."[75] In analyzing this interaction, Ivy concludes that "Victoria suffers a credibility deficit due to an identity stereotype or prejudice,"[76] and "Susan doubts Victoria's testimony . . . privileg[ing] her own perceptions, rather than trust[ing] Victoria's testimony."[77] Ivy's hypothetical clearly illustrates how instances of gaslighting force a speaker to question their own credibility as a knower of information.

Ivy's example aptly introduces how testimonial injustice may present itself in the legal system where witness testimony may be wrongly discounted or

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[67] Ivy, *supra* note 6, at 168.

[68] *Id.*

[69] *Id.* Ivy also acknowledges a more direct kind of gaslighting that comes in the form of psychological abuse. *Id.* Ivy illustrates this direct form of gaslighting by explaining where the term "gaslighting" originated from—the 1944 film, *Gaslight*, which tells the story of a man trying to convince his wife to doubt her memory and sense perceptions in order to have her committed for mental instability. *Id.*

[70] *Id.*

[71] *Id.*

[72] Misgendering is "the assignment of a gender with which a party does not identify." Chan Tov McNamarah, *Misgendering as Misconduct*, 68 UCLA L. REV. DISC. 40, 42 (2020).

[73] Ivy, *supra* note 6, at 168.

[74] *Id.*

[75] *Id.*

[76] *Id.* at 169. That stereotype is that transgender women are emotional and are therefore less reliable narrators. *Id.*

[77] *Id.* When Susan doubts Victoria's testimony, she exemplifies what Ivy described as "another site of subtle, but deeply troubling epistemic injustice." *Id.*

attacked without safeguards. Put another way, Ivy's example identifies a particular vulnerability of marginalized people to testimonial injustice when they testify.[78] Being misgendered is insulting and discriminatorily withholds respect and acknowledgment from transgender people.[79] Misgendering expresses a form of control and social domination because "the speaker rejects the referent's identity and imposes the speaker's own."[80] Susan's gaslighting is an example of testimonial injustice in an everyday linguistic exchange. When this injustice occurs in court, and goes unaddressed, an attorney's act of gaslighting has the weight of systemic authority on their side.[81]

By connecting Ivy's articulation of gaslighting as epistemic injustice to Dotson's articulation of epistemic violence and practices of silencing, gaslighting seems to parallel testimonial quieting.[82] Victoria is quieted when Susan fails to identify Victoria as a knower of her experience. Moreover, Victoria may be coerced into testimonial smothering if she is misgendered again by one of her coworkers.[83] Victoria might not disclose the incident to another coworker, or she might alter how she shares her experiences by changing the narrative to fit what she anticipates others will understand. Another example of testimonial smothering is common among people of color talking about race and racism with their white peers. In *Conversations I Can't Have*, Cassandra Byers Harvin shares her hesitation in engaging in conversations about race because white people have routinely and systemically discredited Black people on the

[78] This phenomenon interestingly implicates the role of cross-examination at trial. "[C]ross-examination, the 'greatest legal engine ever invented for the discovery of truth,'" is an integral part of our legal system. California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (3d ed. 1940). "While most lawyers are familiar with Wigmore's famous quotation, few are familiar with the caveat that shortly follows it: 'A lawyer can do anything with cross-examination . . . . He may, it is true, do more than he ought to do; he . . . may make the truth appear like falsehood.'" Frank E. Vandervort, *A Search for the Truth or Trial by Ordeal: When Prosecutors Cross-Examine Adolescents How Should Courts Respond?*, 16 WIDENER L. REV. 335, 335 (2010) (quoting 5 WIGMORE, *supra*, § 1367). Echoing Wigmore's recognition that cross-examination must be controlled, this Note suggests ways in which lawyers may reduce any chance of epistemically harming witnesses on cross-examination. *See infra* Part III.

[79] *See* Chan Tov McNamarah, *Misgendering*, 109 CALIF. L. REV. 2227, 2254 (2021).

[80] *Id.* at 2253, 2255.

[81] *See* Nora Berenstain, *White Feminist Gaslighting*, 35 HYPATIA 733, 733-36 (2020) (contending that "structural gaslighting is a hallmark of white feminist methodology" because it willfully misrepresents "the lack of fit between white feminism and the socio-political realities" and then seeks to discredit lived experiences that do not align with "feminism that applies only to particularly situated women"). Structural gaslighting, Berenstain writes, "functions to obscure the nonaccidental connections between structures of oppression and the patterns of harm that they produce and license." *Id.* at 734.

[82] *See* Dotson, *supra* note 21, at 238.

[83] *See id.*

subject of racism in the United States and meet these conversations with "hurt feelings and surprise and defensiveness."[84]

Dotson's distinction between an instance and a practice of silencing is important to epistemic and testimonial injustice:

> An instance of silencing concerns a single, non-repetitive instance of an audience failing to meet the dependencies of a speaker, whereas a practice of silencing, on my account concerns a repetitive, *reliable* occurrence of an audience failing to meet the dependencies of a speaker that finds its origin in a more pervasive ignorance.[85]

Where these instances of silencing become increasingly harmful and reliable, they inflict a greater epistemic harm. Moreover, even if only an *instance* of silencing is committed, it is embedded with the power of repetition. This demonstrates precisely why Susan misgendering Victoria in Ivy's example above is so profound—the power of repetition underlies the very pernicious ignorance[86] that harms and fuels testimonial injustice and epistemic harm on structural and systemic levels.[87] Identifying this epistemic harm, Dotson notes, is a context-dependent exercise that relies on an identification of the audience's failure to reciprocate the speaker's testimony, the power relations involved in the speaker-audience relationship, and other contextual factors.[88] Thus, the remainder of this Note develops a conception of testimonial injustice in the context of witness testimony at trial.

> *Epistemic oppression is not an equal opportunity institution: it affects all of us, but not all of us equally.*
>
> —José Medina[89]

[84] Cassandra Byers Harvin, *Conversations I Can't Have*, ON ISSUES, April 1996, at 1, 15-16. The example Harvin provides is of a Black woman working on meeting a writing deadline at a public library when she is approached by a middle-aged white woman who asks what she is working on. When the Black woman responds that she is working on a piece about raising Black sons, the white woman asks how that is different from raising white sons, which Dotson identifies as testimonial smothering. The Black woman, assessing that the white woman's tone insinuates that she is making something out of nothing, makes an excuse not to have the conversation. *Id.* Knowing that many white people across the United States do not believe or discredit the testimony of Black Americans about racism, the Black woman withholds her testimony. *See id.*

[85] Dotson, *supra* note 21, at 241.

[86] "Pernicious ignorance should be understood to refer to any reliable ignorance that, in a given context, harms another person (or set of persons)." *Id.* at 238. One repetitive harm that follows from pernicious ignorance is the interference with linguistic exchanges such that they result in testimonial injustice. *Id.*

[87] *See id.*

[88] *Id.* at 239.

[89] MEDINA, *supra* note 7, at 28.

B. *Testimonial Injustice in the Practice of Law*

A speaker's dependency on their audience is also present in the law where, for example, at trial, testifying witnesses depend on their audience's ability to receive their testimony at face value.[90] But who comprises the audience? At trial, there are several possibilities, including judges and juries. A broader view might include attorneys, the public at large, and similarly situated people to the parties in a given case. Audiences are essential to determining the credibility of a witness during trial. As Deborah Tuerkheimer explains, "credibility is itself a form of power."[91]

Witnesses called to testify are vulnerable because they are subject to a heightened sense of dependency upon a factfinder tasked to determine the value of their testimony in establishing a set of legally relevant facts in the case.[92] Attorneys are responsible for shaping that narrative by asking prescribed forms of questions.[93] The witnesses are unable to force their audiences to hear them or understand their testimony.[94] In some circumstances, the extent to which witnesses are denied linguistic reciprocation exposes them to testimonial injustice.[95]

Lay witness testimony is scrutinized for its relevance, admissibility, and usefulness.[96] These evidentiary standards translate to perceptions about the witness's credibility, their trustworthiness as knowers of information, and the truthfulness of their testimony. These audience assessments of witness credibility, admissibility, and usefulness are also subject to audience prejudices that may disadvantage the credibility of people with marginalized and underrepresented identities.[97] When a witness is subject to instances of silencing or testimonial injustice, these credibility assessments implicate epistemic injustice. An audience's assessment of a witness may coerce the witness to quiet or smother their testimony.[98] In some instances, this could be the result of gaslighting.

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[90] Dotson, *supra* note 21, at 238 (highlighting Jennifer Hornsby's model of "successful linguistic exchange" in linking pornography to silencing of women).

[91] TUERKHEIMER, *supra* note 43, at 3.

[92] *See* Helene Love, *The Vulnerable Subject on Trial: Addressing Testimonial Injustice in the Rules of Evidence*, 12 ELDER L. REV. 1, 2 (2019).

[93] *See id.*

[94] Dotson, *supra* note 21, at 238 ("[W]e all need an audience willing and capable of hearing us." (emphasis omitted)).

[95] *Id.*

[96] *See supra* notes 14-20.

[97] *See* Rand, *supra* note 45, at 42; *see also* Mikah K. Thompson, *Just Another Fast Girl: Exploring Slavery's Continued Impact on the Loss of Black Girlhood*, 44 HARV. J.L. & GENDER 57, 72 (2021) ("White society promote[s] stereotypes regarding the inherent dishonesty of Black people.").

[98] *See generally* Maria L. Ontiveros, *Adoptive Admissions and the Meaning of Silence: Continuing the Inquiry into Evidence Law and Issues of Race, Class, Gender, and Ethnicity*, 28 SW. U. L. REV. 337 (1999) (explaining how effects of race, gender, ethnicity, and class, or

One example arises during cross-examination. Returning to the previous slip-and-fall hypothetical where Tom is testifying about what he saw on the day of the accident, we can assume that he was brought to testify because of his presence at the pool on the day of Josie's injury. After Tom testifies about his observations on direct examination, Violet would likely cross-examine him. Thus, Violet would question Tom about his memory and perceptions of the event to expose potential deficiencies in his knowledge of the accident. Or Violet might attack Tom's credibility by introducing new evidence about his character for truthfulness. There may be instances where Violet, in attacking Tom's credibility, begins to induce Tom to question his own perception of the events or his reliability regarding the events more broadly. When further asked about his memory of the incident, Tom considers his audience's doubt about his truthfulness, and smothers his testimony to fit what he understands Violet, the judge, and the jury capable of comprehending. Tom's credibility is compromised for the purpose of factfinding, which relies on seeking the "truth" to determine the outcome of the case. Tom's perception of his own credibility is also compromised because he is not being recognized as a knower of his experiences.

Also consider this exchange between a parent, Mr. Saba, whose son was injured in a slip-and-fall, and the opposing counsel during his testimony. Consider, while reading, the possible effect of these questions, and Mr. Saba's reactions, on the various audiences. For context, the witness was being questioned about his ability to find housing after his son's accident.

> Q. So you had plenty of time to go out and look for apartments; correct?
>
> A. I have the slip-and-fall, which it makes setback in my life. Then I have the heart attack, Mr. Ross, which is setback in my life. I don't understand you really. You expect someone to just came out from a surgery to go and look for a place? I don't understand you.
>
> Q. How about the entire year of 1999? That was plenty of time to go out and look for an apartment, wasn't it?
>
> A. I was trying my best to get out from there. The situation over—everybody knew it. The rent and the availability of the apartments around—it's very, very, very hard. Very, very, very hard. It's very, very hard. Everybody know about it.
>
> Q. Well, let's see. If you went at it for eight hours a day during the entire year 1999, don't you think you could have found an apartment somewhere else?
>
> A. I did try my best. I couldn't find a place. I didn't find a place. That's it. And my money, what I make during that time—it's enough only to cover me, the food, and the rent. I'm not making any crime over here.

a combination of those factors, affect interpretations of silence in context of adoptive admissions).

> Q. So you just had to put your son's health at risk because you couldn't find a place.
>
> . . .
>
> Q. Let's talk about whether anyone at the Madison Park Apartments was deliberately trying to make you suffer . . . .[99]

Exploring the role of identity, prejudice, and bias, we see a related, yet distinct, vulnerability of witnesses during their testimony at trial. Imagine the witness in the hypothetical slip-and-fall case is a Black woman, and that the defense attorney holds negative prejudices regarding the credibility of Black women.[100] The evidence that the defense attorney may introduce or the narratives that the defense attorney may employ are likely to be shared with the audiences absent some other rational intervention. As Sheri Lynn Johnson illustrates in *The Color of Truth: Race and the Assessment of Credibility*, attorneys historically and presently argue that Black witnesses are inherently less credible because of their race.[101] Often, people of color are preemptively aware of these prejudices and their role in credibility determinations before they testify. As a result, witnesses may truncate their testimony to fit the expectations of their audiences, which could very well provide testimony that is not told in a way most comfortable or complete to the witness.[102] And in many cases, witnesses are often told to do so by their attorneys.[103] In Mr. Saba's testimony, the attorney fails to take up Mr. Saba's testimony about his inability to seek adequate housing for his son. The prejudices that harm the witness's ability and willingness to offer uncensored testimony not only epistemically harm the witness, but they also harm the court's search for the truth. It is equally possible that the witness be subjected to testimonial quieting. The same prejudices that plague the attorneys, judge, and jury, and may cause the witness to truncate his

[99] Testimony of Plaintiff's Witness, Nickolas Saba, Rowland v. Madison Park Apartments, No. YC 044574, 2003 WL 25751180 (Cal. Super. Oct. 1, 2003).

[100] *See* Thompson, *supra* note 97, at 75 (citing Johnson, *supra* note 45, at 267).

[101] *See* Johnson, *supra* note 45, at 274. For a documentation of Black women's particular vulnerability to pervasive stereotypes, see generally Marilyn Yarbrough & Crystal Bennett, *Cassandra and the "Sistahs": The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 J. GENDER RACE & JUST. 625 (2000) (documenting Black women's particular vulnerability to pervasive stereotypes).

[102] *See, e.g.*, Cathy Lesser Mansfield, *Deconstructing Reconstructive Poverty Law: Practice-Based Critique of the Storytelling Aspects of the Theoretics of Practice Movement*, 61 BROOK. L. REV. 889, 927-28 (1995) ("[G]iven the choice between presentation of full story regardless of its impact on legal outcome, and presentation of interpreted story, distilled for legal content, I believe most clients would choose presentation of a distilled story.").

[103] *See, e.g.*, Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 121 (2008) ("Lawyers can misuse [their power to shape their clients' stories] in a number of ways: by silencing client voices, by omitting particular kinds of narratives, by presenting only narratives that are acceptable to the legal system, and by requiring client obedience to the lawyer's translation of the story."); *see also* Mansfield, *supra* note 102, at 928.

speech, would likely also alter the factfinder's perception of the witness as a knower, devaluing the witness's credibility. Even if the witness did not truncate his speech, it is likely that these prejudices would impact the audiences' ability to take up the information that the witness shared—granting the witness little to no weight in their determination of the facts. This illustration of testimonial quieting, as a practice, becomes a greater harm to narratives in the legal system about the truth of the facts set out in a case. Without uninhibited testimony regarding the facts at issue, the picture otherwise painted in the case is incomplete. The question for practice becomes, how do we structure the relationship between the individual's story and the need for the law to focus on the factors required by the law without inflicting epistemic harm through testimonial injustice?

Outside the courtroom, instances of testimonial injustice are particularly common. Returning to the first slip-and-fall case, imagine that Josie is being represented by an attorney, Patrick. Before trial, Josie and Patrick meet to discuss her lost wages and medical expenses. Josie explains to Patrick that she has two jobs. The first of which is cleaning houses in her neighborhood, but when that does not provide enough disposable income, she engages in sex work. Josie wants to request damages against Violet for lost income from both of her jobs, but Patrick does not think that her sex work will be well-received by the judge or jury because of social stigma and its traditional illegality. Patrick does not understand why Josie would engage in sex work and suggests leaving this work out of their damage estimation. Josie disagrees and explains that she engages in sex work because it pays her more, gives her the flexibility to support her family, and lacks the structural barriers that typically prevent her entry into more conventional lines of work.[104] Here, Patrick does not fully understand Josie's reasoning and anticipates that the judge and jury will similarly not find her lost wages from sex work sympathetic and associate her sex work with a morally deprived character.[105] This conflict leaves Josie vulnerable. From Josie's perspective, if she is asked to testify about her lost wages, she might perceive two rational paths forward. First, Josie's testimony may be quieted because her audiences are unable to recognize Josie as a knower of their choices and, even if she shares her perspective, the dominant narratives about sex work being immoral may supplant her own. Second, Josie may smother her testimony

[104] *See* MOLLY SMITH & JUNO MAC, REVOLTING PROSTITUTES: THE FIGHT FOR SEX WORKERS' RIGHTS 55 (2020) ("Sex workers should not have to defend the sex industry to argue that we deserve the ability to earn a living without punishment."). Dudu Dlamini explained, "What it's all about is money . . . What am I gonna eat with my kids? My kids are hungry now. I need quick cash . . . I will go. I will survive. And I will come back with money. I will take care of my kids." *Id.* at 53-54 (citing CHI MGBAKO, TO LIVE FREELY IN THIS WORLD: SEX WORKER ACTIVISM IN AFRICA 38 (2016)).

[105] U.S. district attorney Edwin Sim has similar views on prostitution: "[T]he characteristic which distinguishes the white slave from immorality . . . is that the women who are victims of the traffic are forced unwillingly to live an immoral life." *Id.* at 25 (citing JO DOEZEMA, SEX SLAVES AND DISCOURSE MASTERS: THE CONSTRUCTION OF TRAFFICKING 18 (2010)).

if she perceives her audiences unwilling or unable to understand her explanation and, thus, truncates her testimony to ensure her audience hears only what Josie expects them to understand.[106] Both outcomes illustrate how testimonial injustice perpetuates dominant narratives about sex workers in the United States,[107] criminalizes "survival labor,"[108] and shows the epistemic dilemma presented to vulnerable witnesses. Regardless of the path she chooses, Josie risks the outcome of her case and is prevented from communicating uninhibited testimony that would allow her to shape perceptions of the seriousness of her problem and encourage acknowledgment of intracommunity problems.[109]

This dilemma inflicts epistemic harm. One scholar, Helene Love, relies on Fricker's epistemic injustice and Tuerkheimer's credibility discounting to explain how testimonial injustice negatively impacts the legal system and the individual.[110]

> When testimonial injustice occurs, not only is the individual harmed but so too is the legal system that fails to take on that knowledge. Without the knowledge that the speaker could have shared, common law trials are basing legal outcomes on a distorted version of the facts. The practical consequence is that it introduces the risk that legal disputes are decided without the benefit of the most complete set of facts possible, and that trial outcomes are unjust. Failing to deliver just outcomes adversely affects the operation and perception of fairness of the justice system.[111]

Harm caused to marginalized people goes well beyond devaluing a person's credibility. Testimonial injustice harms a person's willingness and ability to engage with the legal system. It reinforces patterns and practices of marginalization by sending a clear message to others about what narratives will be believed and how they must be communicated. This may, for instance, partially explain why so few sexual assaults are reported by LGBTQ+ survivors.[112] Manifestations of epistemic injustice show that if we import a lens

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[106] *See* Dotson, *supra* note 21, at 244.

[107] These dominant narratives include how sex workers lack autonomy and are systematically undervalued as knowers, compounded by racial dynamics as well. *See* MAC & SMITH, *supra* note 104, at 1-2.

[108] Yvette Butler, *Survival Labor*, 112 CALIF. L. REV. (forthcoming 2024) (manuscript at 1, 10), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4358440 [https://perma.cc/LG94-934H] (proposing shift in narrative about work, specifically sex work, and coining term "survival labor" to describe criminalized acts made necessary by extreme financial hardship).

[109] *See* Crenshaw, *Mapping the Margins*, *supra* note 64, at 1256.

[110] Love, *supra* note 92, at 4. *See also generally* Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PENN. L. REV. 1 (2017).

[111] Love, *supra* note 92, at 4 (footnote omitted). Love's article suggests that "to reflect the inherent vulnerability of witnesses, the rules that control the admissibility of evidence during a trial should be organized around Martha Fineman's vulnerability theory." *Id.* at 1.

[112] *Barriers to Reporting Sexual Violence in LGBTQ Communities*, RAINN (June 19, 2020), https://www.rainn.org/news/barriers-reporting-sexual-violence-lgbtq-communities

sensitive to testimonial injustice, one that lends itself to more accurately assessing credibility, then we may be able to address serious and preventable harms.

It is often difficult to quantify abstract harms like epistemic harm. Although some scholars are critical of abstracting practical terms by imposing philosophical conceptions of terms like "epistemic harm," "testimonial injustice," "quieting," and "smothering" because it detracts from answering important questions and solving problems,[113] this Note situates itself against this view by providing examples and proposing solutions to address the epistemic harm of testimonial injustice. This Note's subsequent analysis of Title VII employment discrimination attempts to lay a foundation for future exploration of remedial measures to address the epistemic harm of testimonial injustice.

C. *Title VII Sex Discrimination*

Title VII of the Civil Rights Act of 1964 prohibits covered employers[114] from discriminating[115] on the basis of race, color, religion, sex, and national origin.[116] Specifically, Title VII protects against "disparate treatment," which "occurs when an employer treats some individuals less favorably than other similarly situated individuals because of their [membership in a protected class]."[117]

A prima facie claim of disparate treatment under Title VII requires an employee to show that: (1) they are a member of a protected class; (2) they were qualified for the position; (3) they suffered an adverse employment action; and (4) the circumstances of the adverse employment action create an inference of discrimination.[118] The plaintiff may offer direct or indirect evidence to establish their claim, although direct evidence of disparate treatment on the basis of a

[https://perma.cc/T2FY-DFGW] (explaining why LGBTQ populations have lower rates of reporting sexual assault despite experiencing higher rates of sexual violence); *see also* Adam M. Messinger & Sarah Koon-Magnin, *Sexual Violence in LGBTQ Communities*, *in* HANDBOOK OF SEXUAL ASSAULT AND SEXUAL ASSAULT PREVENTION 661-74 (William T. O'Donohue & Paul A. Schewe eds., 2019).

[113] *See* READINGS IN THE PHILOSOPHY OF LAW, *supra* note 1, at 17. Thompson also shows the ways in which attorneys, judges, and jury members act on and reinforce these stereotypes. *See generally* Thompson, *supra* note 97.

[114] Title VII defines employers as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b).

[115] "[F]ail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . . ." 42 U.S.C. § 2000e-2(a)(1).

[116] *Id.*

[117] U.S. EQUAL EMP. OPPORTUNITY COMM'N, GUIDANCE CM-604, THEORIES OF DISCRIMINATION § 604.2 (1988). Title VII also prohibits disparate impact in the workplace. Disparate impact claims are founded on circumstances where an employer uses criteria for employment actions that *in effect* disqualify or limit employees in one or more protected classes. *Id.* at § 604.7.

[118] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

protected trait is rare.[119] Thus, disparate treatment claims are commonly based on indirect or circumstantial evidence.[120]

Indirect evidence engages with the burden-shifting framework that the Supreme Court established in *McDonnell Douglas Corp. v. Green*.[121] Under *McDonnell Douglas*, a plaintiff must first establish a prima facie claim of disparate treatment based on their membership in a protected class.[122] If the plaintiff is successful, the burden of production then shifts to the employer. The employer must show a legitimate, nondiscriminatory reason for the challenged employment action.[123] Finally, if the employer is successful, the plaintiff must then establish that the legitimate, nondiscriminatory reason offered by the defendant employer was pretext for their disparate treatment or for their discriminatory animus.[124] Showing pretext allows the defendant employer to show that there is another, nondiscriminatory reason for their employment action unrelated to the plaintiff employee's membership in the protected class.[125]

Remedies in Title VII cases may be compensatory, such as lost wages,[126] and punitive to deter future improper or illegal conduct.[127] However, the remedies provided under Title VII have been criticized for being insufficient and inadequate.[128] This Note seeks to demonstrate how the traditional remedies for

[119] When a plaintiff offers direct evidence of discrimination based on their protected trait, the evidence establishes the prima facie case of disparate treatment under Title VII—shifting the burdens of production and persuasion to the employer. *Id.* The employer must then proffer a legitimate, nondiscriminatory reason for its action. *Id.*

[120] Indirect or circumstantial evidence is evidence that "does not, on its face, prove a fact in issue but gives rise to a logical inference that the fact exists." *Circumstantial Evidence*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/circumstantial_evidence [https://perma.cc/BY9H-Z5KF] (last updated Jan. 2022) ("[C]ircumstantial evidence of intentional discrimination can include suspicious timing, ambiguous statements, different treatment, personal animus, and other evidence can allow a jury to reasonably infer intentional discrimination.").

[121] 411 U.S. 792 (1973).

[122] *Id.* at 802.

[123] *Id.*

[124] *Id.* at 804.

[125] *See id.* at 804-05.

[126] 42 U.S.C. § 2000e-5 (providing for back and front pay provisions in Title VII). Lost wages may also include other monetary benefits that the employee lost because of discrimination, including overtime, shift differentials, raises, vacation pay, sick pay, other fringe benefits, pension and retirement plan benefits, and bonuses. *See, e.g.*, Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1562 (11th Cir. 1986); Rasimas v. Mich. Dep't of Mental Health, 714 F.2d 614, 626 (6th Cir. 1983).

[127] *See, e.g.*, 42 U.S.C. § 1981a (covering availability of and access to compensatory and punitive damages). However, compensatory and punitive damages have statutory restrictions embedded in the statute. For example, the two forms of damages are only available in cases of intentional discrimination, not in disparate impact cases. *See id.* § 1981a(a)(1), (b)(2).

[128] *See generally* Michael W. Roskiewicz, *Title VII Remedies: Lifting the Statutory Caps from the Civil Rights Act of 1991 To Achieve Equal Remedies for Employment Discrimination*, 43 WASH. U. J. URB. & CONTEMP. L. 391 (1993).

Title VII employment discrimination are underinclusive of the full harm caused to plaintiffs, reflecting the legal system's overall failures to recognize epistemic harm as a distinct category of harm that requires remedial action.

D. *Evidence and Testimony in Title VII Cases*

The success of an employment discrimination claim under Title VII relies on the availability of often hard-to-gather evidence of discrimination. Thus, providing evidence that is clear and free from inhibitive audiences is essential. One such inhibitor is identified by Gonzales Rose, who has adapted Ibram X. Kendi's definition of a "racist idea" to develop a framework for recognizing "racist evidence."[129]

> Racist evidence includes: (1) evidence that suggests one racial group is inferior to or superior to another racial group in any way, (2) products of structural racism, (3) racially disparate evidentiary burdens in proving one's racialized reality, and (4) the ways that racism distorts observation, perception and—accordingly—belief, which is then utilized as a basis of proof in legal proceedings.[130]

This Note borrows notions from Gonzales Rose's definition of racist evidence and applies it to issues presented in *Bostock v. Clayton County*[131] and its companion cases before the Supreme Court. Gonzales Rose's conception of racist evidence will further shape this Note's analysis of epistemic injustice and will inform its approach to suggesting reforms.

> *Judging credibility is a mighty power—because credibility is itself a form of power. Whenever we judge credibility, we are in a position to value, or to devalue, the speaker. Yet as a society and as individuals, we wield this power in troubling ways.*
>
> —Deborah Tuerkheimer[132]

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[129] Jasmine B. Gonzales Rose, *Racial Character Evidence in Police Killing Cases*, 2018 WIS. L. REV. 369, 369-74 [hereinafter Gonzales Rose, *Racial Character Evidence*].

[130] Gonzales Rose, *Race, Evidence, and Epistemic Injustice*, *supra* note 8, at 380 (footnote and internal quotations omitted). Gonzales Rose is a critical proceduralist who writes about how racist evidence can carry evidentiary value in litigation that "offends well-established principles of evidence law and notions of fairness, justice, and decency." *Id.*; *see also* Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2243-45 (2017).

[131] 140 S. Ct. 1731 (2020).

[132] TUERKHEIMER, *supra* note 43, at 3; *see also* Charles L. Convis, *Testifying About Testimony: Psychological Evidence on Perceptual and Memory Factors Affecting the Credibility of Testimony*, 21 DUQ. L. REV. 579, 580 (1983) (documenting blurred distinction between capacity to testify and credibility in testimony).

II. TESTIMONIAL INJUSTICE IN *BOSTOCK V. CLAYTON COUNTY*

Until 2019, the U.S. Courts of Appeals were split over whether an employee's sexual orientation and gender nonconformity are included in Title VII's protection against "sex" discrimination in the workplace. The Supreme Court's opinion in *Bostock v. Clayton County* addresses three decisions on appeal from the Eleventh, Second, and Sixth Circuits. First, in *Bostock*, the Eleventh Circuit Court of Appeals held that Mr. Bostock could not seek protection under Title VII for discrimination on the basis of his sexual orientation.[133] Second, in *Zarda v. Altitude Express, Inc.*,[134] the Second Circuit Court of Appeals found that Mr. Zarda could use Title VII to bring his claim of workplace discrimination on the basis of his sexual orientation.[135] Finally, in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*,[136] the Sixth Circuit Court of Appeals found that Ms. Stephens was similarly able to use Title VII to bring her claim of employment discrimination on the basis of her transgender identity.[137] Each of these cases hinged, in large part, on the interpretation of "sex" in Title VII, and whether it includes sexual orientation and gender identity in its protection against sex discrimination in the workplace.

This Part will begin by briefly describing the facts and procedural history of *Bostock* and *Zarda*, but will spend more time on the facts and procedural history of *Harris Funeral Homes*. Next, this Part will describe instances where the plaintiffs may have experienced epistemic harm in their respective cases, and how that harm is a product of the application of Title VII and evidence law in proving disparate treatment. Finally, this Part will examine Justice Gorsuch's majority opinion in *Bostock* by identifying where it is deficient in laying the groundwork to adequately prevent epistemic harm to marginalized people, particularly gender and sexual minorities. In doing so, this Part will apply a critical lens to illustrate where and how the opinion could have been more inclusive of marginalized groups and could have addressed vulnerabilities to epistemic injustice.

A. Bostock *and* Zarda

Gerald Bostock is a gay man who worked for Clayton County, Georgia, as a Child Welfare Services Coordinator in juvenile court. In his role, Mr. Bostock helped children who had been abused or neglected through the court's special-advocate program.[138] Before 2013, Mr. Bostock regularly received positive

[133] Bostock v. Clayton Cnty. Bd. of Comm'rs, 723 F. App'x 964, 964-65 (11th Cir. 2018) (per curiam).

[134] 883 F.3d 100 (2d Cir. 2018).

[135] *Id.* at 108.

[136] 884 F.3d 560 (6th Cir. 2018).

[137] *Id.* at 567.

[138] Michael Schulman, *The Three People at the Center of the Landmark Supreme Court Decision*, NEW YORKER (June 16, 2020), https://www.newyorker.com/culture/cultural-comment/the-three-people-at-the-center-of-the-landmark-supreme-court-decision.

performance feedback, including an award in 2007 for excellence in his work.[139] In January 2013, Mr. Bostock joined the Hotlanta Softball League, a gay recreational softball league.[140] Over the next few months, Mr. Bostock's colleagues openly criticized his participation in the softball league and his sexual orientation.[141] Mr. Bostock was fired about two months after an April 2013 internal audit of his program.[142]

On September 5, 2013, Mr. Bostock filed a complaint with the EEOC stating that he believed he was discriminated against because of his sex and sexual orientation.[143] About two years later, on May 5, 2016, Mr. Bostock filed a complaint in the United States District Court for the Northern District of Georgia.[144] On appeal, the Eleventh Circuit Court of Appeals affirmed the dismissal of Mr. Bostock's case and held that Title VII does not prohibit employees from being fired on the basis of their sexual orientation.[145]

Donald Zarda was a gay man who found his passion for skydiving in his early twenties and worked as a skydiving instructor for Altitude Express on Long Island, New York.[146] Mr. Zarda would tandem skydive with clients, which required him to be "strapped hip-to-hip and shoulder-to-shoulder" with them.[147] Mr. Zarda and his coworkers regularly made jokes about his sexuality.[148] At

[139] Chris Johnson, *Gerald Bostock Has His Day in Court*, WASH. BLADE (Oct. 9, 2019), https://www.washingtonblade.com/2019/10/09/gerald-bostock-has-his-day-in-court/ [https://perma.cc/FQ87-VMES] ("Under his leadership, Bostock was given favorable performance reviews. In 2007, Clayton County CASA received the Program of Excellence Award from Georgia CASA.").

[140] Schulman, *supra* note 138.

[141] *Id.* In one instance, Mr. Bostock was criticized in an advisory board meeting by his supervisor for his sexual identity and his participation in the softball league. Johnson, *supra* note 139 (describing how Bostock's "participation in the league and his sexual orientation were openly criticized on the job").

[142] Schulman, *supra* note 138. One day, Mr. Bostock showed up to work and his key swipe had been disabled without notice. *Id.*

[143] *See* Bostock v. Clayton County, No. 16-CV-001460, 2016 WL 9753356, at *2 (N.D. Ga. Nov. 3, 2016) ("Mr. Bostock filed a Charge of Discrimination with the Equal Employment Opportunity Commission . . . on September 5, 2013.").

[144] *See id.* ("On May 5, 2016, Mr. Bostock filed his initial Complaint pro se. This pleading alleged only discrimination on the basis of sexual orientation.").

[145] Bostock v. Clayton Cnty. Bd. of Comm'rs., 723 F. App'x 964, 964-65 (11th Cir. 2018) (per curiam).

[146] Melissa Zarda, *My Brother Was Fired After Revealing He Was Gay. Now I'm Continuing His Fight at the Supreme Court*, TIME (July 1, 2019, 10:56 AM), https://time.com/5617310/zarda-supreme-court-lgbtq/; Schulman, *supra* note 138. In 2014, Donald Zarda passed away in a BASE jumping accident. *See id.* "BASE" is an acronym for "Building, Antenna, Span (the word used for a bridge), and Earth (the word used for a cliff)." BASENUMBERS.ORG, http://www.basenumbers.org/Default.aspx [https://perma.cc/WG84-FXJV] (last visited Apr. 18, 2023); *see also* Zarda v. Altitude Express, Inc., 883 F.3d 100, 108 (2d Cir. 2018).

[147] *Zarda*, 883 F.3d at 108.

[148] *Id.*

times, Mr. Zarda made jokes about his sexuality to female clients hoping that it would dispel concerns about them being strapped to a man during their tandem skydive.[149] In summer 2010, a female skydiver made a comment to Mr. Zarda about being strapped to a "really sexy guy," and he replied with a joke that he was "a hundred-per-cent gay" and that he "ha[d] an ex-husband to prove it."[150] Although the jump went fine, Mr. Zarda was fired soon after.[151]

Around July 2010, Mr. Zarda filed a complaint with the EEOC claiming that he was discriminated against because of his gender as well as his sexual orientation.[152] In September 2010, Mr. Zarda filed a lawsuit in federal court alleging sex discrimination (specifically sex stereotyping) under Title VII and sexual orientation discrimination under a New York state law.[153] The district court granted summary judgment in favor of the defendants in that case.[154] Following procedural complications on appeal—including that the Second Circuit panel did not hear the case until about seven years after the case was filed with the EEOC[155]—Mr. Zarda's case came before the Second Circuit en banc.[156] Unlike Mr. Bostock's case, the Second Circuit held on appeal that Title VII protects employees from discrimination on the basis of their sexual orientation.[157]

Although this Note will focus on the *Harris Funeral Homes* case in its analysis, *Bostock* and *Zarda*'s facts and procedural history help to better understand plaintiffs' exposure to epistemic harm, as well as others affected by the intermediary decisions.[158]

B. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.

Aimee Stephens was a transgender woman who worked as a funeral director at R.G. & G.R. Harris Funeral Homes ("Harris Funeral Homes") both before and after she transitioned.[159] Ms. Stephens began working for Harris Funeral Homes

[149] *Id.*

[150] *Id.*; Schulman, *supra* note 138.

[151] Schulman, *supra* note 138.

[152] *Zarda*, 883 F.3d at 109.

[153] *Id.*

[154] *Id.*

[155] Zarda v. Altitude Express, 855 F.3d 76, 76 (2d Cir. 2017).

[156] *Zarda*, 883 F.3d at 110.

[157] *Id.* at 131-32.

[158] It is worth noting that Mr. Zarda's case is unique because he died in 2014 and his partner, Bill Moore, and sister, Melissa Zarda, continued to fight his battle in court. *See* Schulman, *supra* note 138.

[159] *See* EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 567 (6th Cir. 2018) [hereinafter *Harris Circuit Court*]. Aimee Stephens passed on due to kidney failure on May 12, 2020, about one month before the Supreme Court decided her case. *See* Aimee Ortiz, *Aimee Stephens, Plaintiff in Transgender Case, Dies at 59*, N.Y. TIMES (June 16, 2020), https://www.nytimes.com/2020/05/12/us/aimee-stephens-supreme-court-dead.html; Kate Santich, *Sole Surviving Plaintiff in Supreme Court's LGBTQ Ruling: The Fight Isn't Over*,

in October 2007 while she presented as male.[160] Harris Funeral Homes is a closely held for-profit corporation that operates funeral homes in Michigan.[161] Harris Funeral Homes requires its public-facing employees to adhere to a dress code.[162] This policy required men to wear suits and women to wear skirts and business jackets.[163]

After nearly six years of working at Harris Funeral Homes, on July 31, 2013, Ms. Stephens informed her supervisor, Thomas Rost, that she had "decided to become the person that her mind already is," and would pursue gender reassignment surgery.[164]

> I have felt imprisoned in my body that does not match my mind, and this has caused me great despair and loneliness. With the support of my loving wife, I have decided to become the person that my mind already is. I cannot begin to describe the shame and suffering that I have lived with. Toward that end, I intend to have sex reassignment surgery.[165]

Pursuing gender reassignment surgery meant that Ms. Stephens wanted to "live and work full-time as a woman for one year."[166] Ms. Stephens informed Rost of her plan to take a vacation until about the end of August 2013 and then return as her "true self, Amiee [sic] Australia Stephens."[167] Before Ms. Stephens took her vacation, Rost privately fired her because Ms. Stephens "was no longer going to represent himself as a man. He [sic] wanted to dress as a woman."[168] In a deposition, Rost testified about how he fired Ms. Stephens:

> Well, I said to him [sic], just before he [sic] was—it was right before he [sic] was going to go on vacation and I just—I said—I just said "Anthony, this is not going to work out. And that your services would no longer be needed here."[169]

Not long after, Ms. Stephens decided to meet with an attorney, and filed a complaint with the EEOC.[170] On September 25, 2014, the EEOC filed suit against Harris Funeral Home for "(1) terminating Stephens's employment on the

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ORLANDO SENTINEL (July 3, 2020, 5:30 AM), https://www.orlandosentinel.com/news/os-ne-gerald-bostock-after-lgbtq-supreme-court-ruling-whats-next-20200703-rildjvhw2bfmxkpw45yj34pjbm-story.html.

[160] EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 844 (E.D. Mich. 2016) [hereinafter *Harris District Court*].

[161] *Harris Circuit Court*, 884 F.3d at 566.

[162] *Id.* at 568.

[163] *Id.* The Sixth Circuit notes that the parties dispute the Harris Funeral Homes' policy of paying for male uniforms but not doing the same for female employees. *Id.*

[164] *Id.*

[165] *Harris District Court*, 201 F. Supp. 3d at 844-45.

[166] *Id.* at 845.

[167] *Id.*

[168] *Id.* at 847.

[169] *Id.* at 845.

[170] *Harris Circuit Court*, 884 F.3d 560, 566 (6th Cir. 2018).

basis of her transgender or transitioning status and her refusal to conform to sex-based stereotypes; and (2) administering a discriminatory-clothing-allowance policy," in violation of Title VII.[171] Harris Funeral Homes filed a motion to dismiss and the district court granted the motion.[172] In the district court's decision, it held that transgender status is not a protected class under Title VII's prohibition against discrimination on the basis of sex.[173] One of its reasons was that Ms. Harris could still bring the case on the basis of sex stereotypes, but not based on her transgender status alone because transgender status or gender identity are not protected classes under Title VII.[174]

Following the grant of the motion to dismiss, the EEOC brought a new claim on behalf of Ms. Stephens under the theory of discrimination based on sex stereotypes,[175] and Harris Funeral Homes changed its position and asserted an exemption under the Religious Freedom Restoration Act ("RFRA").[176] The court found that, although the EEOC met its burden in showing that protecting employees from sex stereotyping in the workplace is a compelling government interest, the EEOC nevertheless failed to show that Harris Funeral Homes had not employed the least restrictive means of protecting employees from sex stereotyping.[177]

On appeal, the Sixth Circuit Court of Appeals permitted Ms. Stephens' case to proceed and held that Title VII prohibits employers from firing employees because of their transgender status.[178] Harris Funeral Homes promptly appealed the Sixth Circuit's decision to the United States Supreme Court, where the case was consolidated with *Bostock* and *Zarda*.[179]

Before taking a closer look at Justice Gorsuch's opinion, it is important to note a few places where Ms. Stephens may have experienced epistemic harm through practices of testimonial quieting and testimonial smothering. First, in his deposition, Rost testified about the reason why Harris Funeral Homes has a dress code: "Well, we have a dress code because it allows us to make sure that our staff—is dressed in a professional manner that's acceptable to the families

[171] *Id.* at 566-67.

[172] *Id.* at 567.

[173] *Id.* at 569 ("In particular, the district court agreed with the Funeral Home that transgender status is not a protected trait under Title VII.").

[174] *Id.* at 569-70.

[175] The "sex stereotypes" theory was established in the Supreme Court opinion *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). This decision established, among other things, that "in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id.* at 251.

[176] *Harris District Court*, 201 F. Supp. 3d at 841. RFRA was enacted to protect individuals from the government substantially burdening their exercise of religion. *See* 42 U.S.C. § 2000bb(a).

[177] *Harris District Court*, 201 F. Supp. 3d at 841.

[178] *Harris Circuit Court*, 884 F.3d at 577.

[179] Bostock v. Clayton County, 140 S. Ct. 1731, 1738 (2020).

that we serve, and that is understood by the community at-large what these individuals would look like."[180] On its face, Rost's testimony demonstrates a neutral reason for why the Funeral Home has a dress code. However, his statement is supported only by prejudices regarding society's expectations of gender expression; it is laden with bias about what is and is not professional. He was concerned about perceptions of the community and "what [their staff] would look like."[181] Rost imposed his beliefs about how certain genders are expected—or "supposed"—to appear. Rost's testimony supported Harris Funeral Homes' argument that the application of their policy, and subsequent decision to terminate Ms. Stephens did not violate her Title VII protections.

Ms. Stephens was well aware of Rost's beliefs about her gender expression.[182] Rost's perceptions about Ms. Stephens and the transgender community also do not exist in isolation of broader societal prejudice. The testimony provided both in and out of the courtroom by transgender people is particularly vulnerable to epistemic harm caused by testimonial injustice. Ms. Stephens and her legal team would have had to overcome an incredible hurdle to not have her testimony silenced by the opposing counsel or by other factfinders. Ms. Stephens would also have to overcome immense pressure not to truncate her testimony. It is also likely that Ms. Stephens would be hesitant to present the full scope of her experiences with discrimination in this case and the harm that she experienced because it may not be understood by her audience. This may also have informed how the attorney coached Ms. Stephens to deliver her testimony in response to assessments about what her audiences would be able to comprehend.

Another instance of epistemic harm is found in the first footnote in the Sixth Circuit's decision: "We refer to Stephens using female pronouns, in accordance with the preference she has expressed through her briefing to this court."[183] Although the Sixth Circuit's decision was favorable to Ms. Stephens, and although this footnote reads as a respectful gesture to Ms. Stephens' pronoun preferences, this footnote nevertheless takes a blatantly neutral stance on the issue of how to properly regard Ms. Stephens', or any transgender person's, gender. Given the fact that the appeals court feels the need to drop a footnote explaining that they will refer to Ms. Stephens using "she" pronouns because of her preference and not in recognition of the fact that she is a woman, it is not difficult to imagine the frequency with which Ms. Stephens was misgendered throughout the proceedings. Instances of misgendering may inflict epistemic harm. It is unlikely that an attorney who persistently misgenders Ms. Stephens, or a jury member who similarly refuses to refer to Ms. Stephens by her proper pronouns, would be the best audience to understand Ms. Stephens' testimony.

[180] *Harris District Court*, 201 F.Supp. 3d at 862.

[181] *Id.*

[182] *SCOTUS Plaintiff Aimee Stephens Speaks Out*, ABC NEWS (Oct. 8, 2019), https://abcnews.go.com/Politics/video/scotus-plaintiff-aimee-stephens-speaks-66146634 [https://perma.cc/XVR5-6KK6].

[183] *Harris Circuit Court*, 884 F.3d at 566 n.1.

Ms. Stephens is vulnerable to testimonial smothering because she could choose to limit her testimony based on what she perceives others to understand.

C. *Justice Gorsuch and the Court's Majority Opinion*

The Supreme Court granted certiorari in 2019 to Mr. Bostock, Mr. Zarda, and Ms. Stephens's cases to resolve whether Title VII protects employees from discrimination on the basis of their sexual orientation and gender identity.[184] Justice Gorsuch, writing for the Court in a 6-3 decision, held that an application of Title VII's text and ordinary public meaning leads the Court to conclude that Title VII's use of "sex" encompasses, and therefore protects against, discrimination on the basis of sexual orientation and gender identity.[185]

> An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids. Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. . . . But the limits of the drafters' imagination supply no reason to ignore the law's demands. . . . Only the written word is the law, and all persons are entitled to its benefit.[186]

The opinion also expresses concern about how the Court's decision may prove to be a sweeping, negative precedent. So, Justice Gorsuch attempts to dispel these concerns.

> [T]hey say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.[187]

On its face, Justice Gorsuch's opinion appears to produce a net positive outcome for LGBTQ+ litigants under Title VII insofar as it finds "discrimination on the basis of sex" includes gender identity, and that it presents Title VII as an avenue for redress.

One limitation of the opinion, however, is that it blurs the line between the unique forms of discrimination that LGBTQ+ litigants face and traditional conceptions of sex discrimination contemplated in Title VII. This limitation is embodied in the first of the two excerpts reproduced above, and is similarly embodied by the opening statement of John Bursch, counsel for the petitioner.[188] Bursch argued that Title VII only requires that employers treat men and women

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[184] *See generally* Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

[185] *Bostock*, 140 S. Ct. at 1737.

[186] *Id.*

[187] *Id.* at 1753.

[188] Transcript of Oral Argument at 29, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 140 S. Ct. 1731 (2020) (No. 18-107).

as equals, not that employers "have to treat men as women."[189] Failing to recognize the distinct forms of discrimination that LGBTQ+ people face sloppily lumps them in with traditional conceptions of sex discrimination and makes them vulnerable to epistemic harm caused by testimonial injustice.[190]

The opinion limits the extent to which future litigants may be subject to testimonial injustice. Litigants may feel pressure to truncate their speech—even more than they already do—to fit traditional notions of sex discrimination, notions that do not recognize the complexities of discrimination against gender and sexual minorities. Relatedly, potential litigants' testimony may be quieted because it otherwise does not fit sex discrimination as it is known by their audiences. The legal system fails to recognize these litigants as knowers of "true" sex discrimination. Without a recognition of this harm, plaintiffs/injured speakers cannot be made whole.

Justice Gorsuch also leaves a series of questions open in the name of judicial modesty and fairness.[191] While he is correct that issues about bathrooms, locker rooms, and dress codes are not before the Court, Justice Gorsuch fails to appropriately identify and acknowledge the connections between those issues and the Court's decision—connections that would help courts analyze these issues in future cases. For example, more recent cases have invoked issues regarding the use of bathrooms and locker rooms in schools, as well as transgender athlete participation in sports.[192] Missing that opportunity exposes LGBTQ+ people and potential litigants to the same forms of epistemic injustice detailed above.[193] Unfortunately, Justice Gorsuch deems those issues as altogether different, and is largely supported in his conclusion that the legal system has been constructed to consider the individual harms in a case, not any larger systemic issues.[194]

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[189] *Id.*

[190] *Cf.* Brian Soucek, *Queering Sexual Harassment Law*, 128 YALE L.J.F. 67 (2018) (showing how sexual harassment as gender policing explains shortcomings of federal sexual harassment law).

[191] *Bostock*, 140 S. Ct. at 1753.

[192] *See* James Esseks, *A Federal Appeals Court Will Decide if Trans Students Can Continue To Play School Sports*, ACLU (May 4, 2021), https://www.aclu.org/news/lgbtq-rights/a-federal-appeals-court-will-decide-if-trans-students-can-continue-to-play-school-sports [https://perma.cc/R2AD-ZV3K].

[193] *See generally* Alexander M. Nourafshan, *The New Employment Discrimination: Intra-LGBT Intersectional Invisibility and the Marginalization of Minority Subclasses in Antidiscrimination Law*, 24 DUKE J. GENDER L. & POL'Y 107 (2017).

[194] *See, e.g.*, Darren Lenard Hutchinson, *"With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CALIF. L. REV. 371, 371 (2022) ("The Supreme Court's equal protection doctrine that focuses narrowly on intentional discrimination is ill-equipped to combat racism associated with criminal justice practices.").

III. PREVENTING EPISTEMIC HARM

"Equality will require change, not reflection."[195] Thus far, this Note has sought to identify and name the practice of epistemic harm and testimonial injustice in lay witness testimony. As Yvette Butler illuminates in her forthcoming article, *Survival Labor*, the practice of identifying and naming this harm and injustice contributes to making the experiences of marginalized people more intelligible to others.[196] And, therefore, seeks to provide communicative and interpretive resources to witnesses and their audiences.[197]

Thus, an articulation of the philosophical conception of epistemic harm and testimonial injustice offered by this Note requires changes to individual behavior in the legal profession and to the legal structures that enable this behavior. Kristie Dotson captures why solutions to this problem would require both legal and nonlegal avenues: identifying and correcting the harm is a context-dependent exercise.[198] She explains that, in order "to communicate *we all need an audience willing and capable of hearing us*."[199] This Section proposes solutions about how to comprehensively prevent epistemic harm and testimonial injustice. This begins with suggested changes to the burden of proof and issue of access in Title VII employment discrimination cases and then to the Federal Rules of Evidence.

A. *Change Within the Law*

The law of lay witness testimony is largely controlled by the rules of evidence and Title VII. Thus, this Section will highlight potential avenues for legal reform. Moreover, issues related to epistemic harm and testimonial injustice are also issues of access. Where witnesses' testimony is quieted or smothered as a product of testimonial injustice, they are unable to engage the civil legal system to achieve justice. As Suzette Malveaux underscores, "[t]he civil justice system works only if ordinary people can use it."[200] And, at present, the civil justice system works in different and disproportionate ways for plaintiffs depending on their identities, their believability, and numerous other factors.[201]

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[195] MACKINNON, *Toward Feminist Jurisprudence*, *supra* note 22, at 235.

[196] *See* Butler, *supra* note 108 (manuscript at 17-18).

[197] *See id.*

[198] *See* Dotson, *supra* note 21, at 238.

[199] *See id.*

[200] Suzette Malveaux, *The Benefits of Class Actions and the Increasing Threats to Their Viability*, *in* A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES 68 (Brooke Coleman, Suzette Malveaux, Portia Pedro & Elizabeth Porter eds., 2022) (discussing need for reform of class action lawsuits in Title VII employment discrimination cases).

[201] *See generally, e.g.*, Rachel Kahn Best, Lauren B. Edelman, Linda Hamilton Krieger & Scott R. Eliason, *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in Equal Employment Opportunity Litigation*, *in* A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES, *supra* note 200, at 41.

1. Title VII

Looking more closely at Title VII, legal reform could be applied to (1) modifications to the evidentiary burdens employed under Title VII[202] and (2) the types of evidence permitted to address litigants' and witnesses' vulnerabilities to harmful epistemic practices. The *McDonnell Douglas* framework relies heavily on specific evidence to reach a conclusion about whether an employee has been discriminated against under Title VII.[203] Indeed, the *McDonnell Douglas* framework was intended to be used where the plaintiff is unable to submit direct evidence.[204] One approach is to lower the burden for plaintiffs to establish a prima facie case of discrimination, or to lower the procedural burdens for plaintiffs to make it past critical stages in litigation.

At the pleadings stage of Title VII cases, litigants are presented with the first hurdle: prevailing on motions to dismiss.[205] Even where plaintiffs' cases survive the motion to dismiss stage, summary judgment presents an even more significant burden.[206]

Extricating bias and removing procedural hurdles associated with the burdens that plaintiffs must meet can allow plaintiffs to vindicate their employment discrimination claims and further engage with introduced evidence supporting or undercutting discrimination during trial. Also, streamlining plaintiffs' ability to engage with the evidence at trial permits plaintiffs to engage with the civil legal system in meaningful epistemic ways. Namely, plaintiffs are able to testify about their experiences, have them heard, and hopefully have them vindicated. Courts should be encouraged to "explicitly consider the multiple and varied structures and experiences of subordination when deciding Title VII cases" when managing plaintiffs' claims.[207] Considering the effects of these burdens on plaintiffs' ability to bring (and maintain) Title VII claims would both allow them

[202] *See* 42 U.S.C. § 2000e-2.

[203] *Cf.* Sandra F. Sperino, *Evidentiary Inequality*, 101 B.U. L. REV. 2105, 2108 (2021) ("The final result of . . . evidentiary inequality is that courts allow employers to draw from a broad palette of facts to defend against discrimination cases, while highly restricting the facts from which plaintiffs can prove their claims.").

[204] D. Wendy Greene, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection*, 47 U. MICH. J. L. REFORM 87, 104 (2013).

[205] *See* Victor D. Quintanilla, *Doorways of Discretion: Psychological Science and the Legal Construction and Erasure of Racism*, *in* A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES, *supra* note 200, at 170-77; *see also* Sperino, *supra* note 203, at 2108 ("[C]ourts often exclude or diminish evidence from workers, requiring them to prove their cases through a narrow band of witnesses and within a constricted time span.").

[206] *See generally, e.g.*, Nancy Gertner, *Losers' Rules*, *in* A GUIDE TO CRITICAL CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES, *supra* note 200, at 116-22.

[207] Jamie Bishop, Emma D'Arpino, Gabriela Garcia-Bou, Kelsey Henderson, Sophie Rebeil, Elizabeth Renda, Gaby Urias & Nicholas Wind, *Sex Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, 22 GEO. J. GENDER & L. 369, 406 (2021).

to play a larger role in shaping the narrative of their case and give them a more equitable chance of prevailing on the merits of their claims.

Thinking more about a plaintiff's ability to bring an employment discrimination claim against their employer under Title VII, access to the forum and its tools is essential. This discussion, as well as the following questions, are comprehensively explored in *A Guide to Critical Civil Procedure: Integrating Critical Legal Perspectives*.[208] While reforms to procedural barriers, such as those presented under Rule 12(b)(6) motions to dismiss and Rule 56 summary judgment motions, are beyond the scope of this Note, it is essential to understand their role in preventing epistemic harm and testimonial injustice in Title VII employment discrimination cases.[209] The following questions, though broad, serve as a foundation for future reform of how we treat witness testimony in Title VII cases in pursuit of eliminating epistemic harm and testimonial injustice.

In what ways are litigants prevented from accessing the forum in the first place? How are procedural mechanisms weaponized to keep cases out of court? What are the epistemic implications of litigants being systemically unable to pursue legal relief because of procedural barriers? Asking these questions and engaging with the frameworks presented therein take yet another step toward a fairer legal system.

2. Rules of Evidence

To accompany reform to the legal burdens that plaintiffs must meet to establish a prima facie case of employment discrimination and to the sociopolitical burdens that plaintiffs must overcome to access the legal system, the Federal Rules of Evidence are also ripe for reform in the name of preventing further harm to witnesses that must testify about their lived experiences and identities. This includes Rule 608, which governs a witness's character for truthfulness or untruthfulness,[210] as well as several other rules of evidence. Other rules that may presently hinder witnesses' freedom from epistemic harm and testimonial injustice include Rules 401 (Test for Relevant Evidence),[211] 402 (General Admissibility for Relevant Evidence),[212] 403 (Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons),[213] 601 (Competency to Testify in General),[214] and 703 (Bases of an Expert's Opinion Testimony).[215] Rule 608 reads:

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[208] *See generally* A GUIDE TO CRITICAL CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES, *supra* note 200.

[209] *See* FED. R. CIV. P. 12(b)(6), 56.

[210] FED. R. EVID. 608.

[211] FED. R. EVID. 401.

[212] FED. R. EVID. 402.

[213] FED. R. EVID. 403.

[214] FED. R. EVID. 601.

[215] FED. R. EVID. 703. *See generally* Louise Ellison, *Closing the Credibility Gap: The Prosecutorial Use of Expert Witness Testimony in Sexual Assault Cases*, 9 INT'L J. EVID. &

> (a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.
>
> (b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:
>
> (1) the witness; or
>
> (2) another witness whose character the witness being cross-examined has testified about. . . .[216]

In drafting the Rules of Evidence, the Advisory Committee claims that Rule 608(a) is "strictly limited to character for veracity, rather than allowing evidence as to character generally."[217] The committee's note states that "[t]he result is to sharpen relevancy, to reduce surprise, waste of time, and confusion, and to make the lot of the witness somewhat less unattractive."[218]

The committee might first consider expanding its guidance on the application of Rule 608(a). Rule 608(a)'s stated purpose, citing materials discussing sensory or mental defects, presently does not discuss how "relevancy" and "confusion" might be exacerbated by testimonial injustice. As drafted, the rule appears concerned only with the witness's character for truthfulness as it relates to factfinding. As discussed above, marginalized witnesses called to testify are uniquely vulnerable to epistemic harm and testimonial injustice. Where this vulnerability exists, guidance in the rule's application should acknowledge a kind of epistemic responsibility for courts and attorneys to guard against harming witnesses' epistemic capacities. As discussed below, Rule 608 is also susceptible to abuse.[219]

Therefore, when a court considers the admissibility of evidence and attorneys prepare their arguments, both parties should be prompted to consider witnesses' vulnerability to epistemic harm that could be caused by attacks to a witness's credibility. Several guiding questions come to mind when thinking about how to

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PROOF 239 (2005) (assessing developments in prosecutors' use of expert witness testimony and potential admissibility of educational expert witness testimony in criminal courts in England and Wales).

[216] FED. R. EVID. 608.

[217] FED. R. EVID. 608 advisory committee's notes on proposed rules.

[218] *Id.* (citing MCCORMICK ON EVIDENCE § 44 (8th ed. 2020) (discussing sensory or mental defects of capacity)).

[219] *Cf.* FED. R. EVID. 608(b) advisory committee's notes on proposed rules.

design safeguards that effectively guide attorneys and judges in the application of Rule 608 and mitigate risk of epistemic harm. How will attacks on the witness's credibility or veracity harm the witness's ability to relate, understand, and know that what they experienced is, at the very least, acknowledged by the legal system? How might these attacks on credibility prejudice the witness's successful communication of their testimony? In what circumstances will people with marginalized or underrepresented identities be asked to share their lived experiences, and in what ways can we protect them from epistemic harm and preserve their credibility while enhancing the judiciary's factfinding function and pursuit of fairness? Finally, do these attacks on witnesses' credibility and veracity serve to deter future claims of discrimination?

A similar examination of Rule 608(b) is warranted. Rule 608(b) relates to Rule 609, which governs the admissibility of evidence of a criminal conviction.[220] In thinking about the use of criminal convictions, Gonzales Rose relatedly explains how "racial character evidence" superimposes racial stereotypes and biases over efforts to establish a witness's veracity in police killing cases.[221] In the context of Rule 608(b), courts are permitted to inquire into extrinsic evidence on cross-examination when it is probative of the witness's character for truthfulness.[222] As demonstrated by Gonzales Rose and Montré D. Carodine, we should be cautious when admitting evidence that has the potential to introduce harmful biases.[223] The advisory committee acknowledges that "the possibilities of abuse are substantial" in the type of evidence that could be admitted under Rule 608(b).[224] Thus, the committee calls for safeguards to be imposed, two of which are Rule 403 (requiring probative value not be outweighed by unfair prejudice) and Rule 611 (barring harassment and undue embarrassment).[225] In theory, these safeguards apply to the application of all the federal rules of evidence. But, at present, is the legal system appropriately prepared to apply these rules with epistemic harm and testimonial injustice in mind?

Reforms to Title VII and the Federal Rules of Evidence envision a legal landscape that places reasonable bounds on the mechanisms that attorneys and factfinders use when seeking the truth. Lawyers, being integral to the legal profession, "should further the public's understanding of and confidence in the

[220] *See* FED. R. EVID. 609.

[221] Gonzales Rose, *Racial Character Evidence*, *supra* note 129, at 371.

[222] FED. R. EVID. 608(b).

[223] *See* Gonzales Rose, *Racial Character Evidence*, *supra* note 129, at 371; Montré D. Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 524-25 (2009) (critiquing "ancient assumption" that "felons of all descriptions are forever afterward less truthful than other folk on any subject" (quoting H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 Duke L.J. 776, 803-04 (1993))).

[224] FED. R. EVID. 608(b) advisory committee's notes to proposed rules.

[225] *Id.*

rule of law and the justice system."[226] Thus, legal changes on their own are insufficient. Lawyers should also become more aware of the universe of harms that may be inflicted on marginalized groups. This would be a collective and collaborative process between attorneys, judges, and other stakeholders that seeks to make the judicial system fairer to litigants who have suffered discrimination.

B. *Change Within the Legal Profession*

Change within the legal system begins with professional responsibilities and development, legal education, and equitable client representation strategies.[227] Lawyers and judges are inextricably tied to the administration of the law; they are educated and trained to do so. But, as Victor D. Quintanilla suggests, based on a justification-suppression model of prejudice, marginalized groups are disproportionately harmed by lawyers and judges that lack norms or frameworks to understand unfamiliar situations or uncertainties in the law.[228] This is because lawyers and judges are more likely to engage in implicitly prejudicial behaviors (which are justified as being appropriate in unfamiliar situations) when a choice is uncertain, norms are unclear, or situations are ambiguous. However, lawyers and judges are also more likely to "suppress prejudice when externally motivated to do so . . . or when internally motivated to do so."[229] Thus, this Section explores changes within the legal profession or legal culture that seek to encourage judges and lawyers to suppress prejudicial behavior.

1. Model Rules of Professional Conduct

First, the Model Rules of Professional Conduct ("MRPC") may safeguard against inflictions of epistemic harm on marginalized groups. Changes to the MRPC would also complement changes to the *McDonnell Douglas* framework under Title VII and modifications to the Federal Rules of Evidence.

The MRPC outline the responsibilities that lawyers must uphold as representatives of clients, officers of the legal system, and public citizens "having special responsibility for the quality of justice."[230] MRPC Rule 4, for example, broadly governs transactions with persons other than clients,[231] and Rule 4.4 details a lawyer's responsibilities regarding "Respect for Rights of

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[226] MODEL RULES OF PRO. CONDUCT PREAMBLE & SCOPE (AM. BAR ASS'N 1983).

[227] *Cf.* Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN'S RTS. L. REP. 297, 298 (1992) ("There are times to stand outside the courtroom door and say 'this procedure is a farce, the legal system is corrupt, justice will never prevail in this land as long as privilege rules in the courtroom.' There are times to stand inside the courtroom and say 'this is a nation of laws, laws recognizing fundamental values of rights, equality and personhood.' Sometimes . . . there is a need to make both speeches in one day.").

[228] *See* Quintanilla, *supra* note 205, at 173-76.

[229] *Id.* at 173.

[230] MODEL RULES OF PRO. CONDUCT PREAMBLE & SCOPE (AM. BAR ASS'N 1983).

[231] *See* MODEL RULES OF PRO. CONDUCT r. 4.

Third Persons."[232] Consider this model rule, for example, where a lawyer has a responsibility to respect the rights of third persons. The comment to the Rule suggests a narrow reading: "[i]t is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship."[233] In the name of preventing epistemic injustice, language could be added to the rule or the comment that would impose a duty on lawyers to consider the implications of their transactions and interactions with parties other than their clients to protect against epistemic injustice.

Additionally, MRPC Rule 8.4 covers "conduct related to the practice of law that occurs outside the representation of a client or beyond the confines of a courtroom."[234] In an opinion to Rule 8.4, the ABA's Standing Committee on Ethics and Professional Responsibility recognizes that while overt workplace discrimination has its protections under Title VII, this rule is intended to cover discrimination not covered by other law.[235] For example, the Committee writes that "a single instance of a lawyer making a derogatory sexual comment directed towards another individual in connection with the practice of law would likely not be severe or pervasive enough to violate Title VII, but would violate Rule 8.4(g)."[236] The Committee acknowledges that common violations of the Rule likely will involve "intentionally discriminatory or harassing" conduct.[237] MRPC Rule 8.4 aptly provides grounds for reform to prevent epistemic harm.

An educational component that also could be added by expanding Rule 8.4's formulation of discrimination and harassment to encompass concepts like testimonial smothering and testimonial quieting. While it may not constitute a violation of the rule, lawyers' conduct that inflicts epistemic harm is deserving of attention. Practices of testimonial injustice very often occur in the legal profession well beyond the lawyer-client relationship, and reforming Rule 8.4 presents an opportunity to intervene in largely unregulated lawyer conduct.

2. Legal Education

Turning next to legal education, teaching law students practical, client-centered lawyering practices would be an effective step toward preventing epistemic harm in witness testimony and throughout the legal system. In their book, *Lawyers, Clients & Narratives*, Carolyn Grose and Margaret Johnson

[232] MODEL RULES OF PRO. CONDUCT r. 4.4.

[233] MODEL RULES OF PRO. CONDUCT r. 4.4 cmt.

[234] ABA Comm. on Ethics & Pro. Resp., Formal Op. 493 (2020). In relevant part, MRPC Rule 8.4(g) states, that "It is professional misconduct for a lawyer to: . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." MODEL RULES OF PRO. CONDUCT r. 8.4.

[235] ABA Comm. on Ethics & Pro. Resp., Formal Op. 493 (2020).

[236] *Id.* at 4.

[237] *Id.* at 6.

emphasize the role of lawyers as storytellers.[238] "Client-centered lawyering is focused on the client and driven by her goals. The client is the decision maker in the case."[239] Similarly, Julie Lawton describes two foundational principles of this kind of lawyering: "(i) respecting the importance of the client's role in decision-making; and (ii) respecting the importance of the attorney's appreciation for their clients' 'perspectives, emotions and values.'"[240] One benefit of client-centered lawyering is that a lawyer must "inquire and listen as well as understand and empathize" with their clients.[241]

Also in Lawton's view, client-centered lawyering encourages lawyers to incorporate a client's non-legal considerations into their legal services.[242] This includes "economic, social, psychological, moral, political, and religious issues."[243] These skills are essential to truly grasping the gravity of epistemic harm to witnesses and particularly to witnesses with marginalized and underrepresented identities that make them vulnerable to this kind of injustice.[244]

3. Allyship

Finally, returning to Veronica Ivy's scholarship, her article, *Allies Behaving Badly*, explains how the terms "ally" and "safe space" are loosely used to create a sense of support for people in LGBTQ+ community without effectively acting as an ally.[245] Ivy argues that we must shift this understanding of allyship to be an earned title rather than a declaration, without action, of allyship. The latter show of allyship treats allyship as an identity, which is fiercely protected in response to criticism about its genuineness. Translating this conception of allyship to something that one can earn through action would greatly improve the legal profession. For example, by shifting their mindset to be more active, lawyers may become more mindful about the narratives they choose for their client. Lawyers should hesitate to supplant stock narratives about their clients to

[238] CAROLYN GROSE & MARGARET E. JOHNSON, LAWYERS, CLIENTS & NARRATIVES: A FRAMEWORK FOR LAW STUDENTS AND PRACTITIONERS, at xvii (2017) ("This book is for those law students and new lawyers who want to develop more fully as effective legal professionals by learning how to hear, tell, construct, and deconstruct stories.").

[239] *Id.* at 30.

[240] Julie D. Lawton, *Who Is My Client? Client-Centered Lawyering with Multiple Clients*, 22 CLINICAL L. REV. 145, 149 (2015).

[241] GROSE & JOHNSON, *supra* note 238, at 31.

[242] Lawton, *supra* note 240, at 150.

[243] *Id.* (internal quotations omitted).

[244] For more on the development of these skills, see generally GROSE & JOHNSON, *supra* note 238; Deborah N. Archer, *There Is No Santa Claus: The Challenge of Teaching the Next Generation of Civil Rights Lawyers in a 'Post-Racial' Society*, 4 COLUM. J. RACE & L. 55 (2013); Kristin B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Students to the "Heart" of Lawyering*, 87 NEB. L. REV. 1 (2008); Antoinette Sedillo López, *Making and Breaking Habits: Teaching (and Learning) Cultural Context, Self-Awareness, and Intercultural Communication Through Case Supervision in a Client-Service Legal Clinic*, 28 WASH. U. J.L. & POL'Y 37 (2008).

[245] Ivy, *supra* note 6, at 168.

appease regressive conceptions of marginalized groups held by the courts and other legal actors. "In transforming their clients' narratives and substituting their own compositions, lawyers engage in an act of story interpretation that may further disempower and silence."[246] Thus, the language and narratives that attorneys employ are crucial to the prevention of epistemic harm. Attorneys and advocates should work alongside vulnerable communities and actors in the legal system to take a hard look at systems of evidence law and Title VII jurisprudence to assess how epistemic harm can be avoided and how we can protect those in our society who suffer disproportionate consequences.

CONCLUSION

The U.S. legal system's recognition of harm is incomplete. Epistemic harm is pervasive and unfairly inflicts harm to a person's credibility and capacity as a knower of information.[247] Although slow, our legal system is capable of recognizing these harms and taking affirmative steps to prevent their continued impact on vulnerable people. In the context of Title VII employment discrimination, modifications to (1) the Federal Rules of Evidence, (2) the burdens required in establishing a prima facie case of disparate treatment under the *McDonnell Douglas* framework, and (3) the MRPC will enable actors within the legal system to understand and recognize this kind of injustice. These pernicious power imbalances in the administration of justice can only be addressed by holistic change. Thus, a critical look at lawyering practices and how we train lawyers to center client experiences and act as proactive and supportive allies is essential to promoting a more justice-oriented legal profession.

[246] Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 914 (1992).

[247] *See* FRICKER, *supra* note 2, at 2.