

Chapter 2

Ad Hominem Fallacies and Epistemic Credibility

Audrey Yap

Abstract An ad hominem fallacy is an error in logical reasoning in which an interlocutor attacks the person making the argument rather than the argument itself. There are many different ways in which this can take place, and many different effects this can have on the direction of the argument itself. This paper will consider ways in which an ad hominem fallacy can lead to an interlocutor acquiring less status as a knower, even if the fallacy itself is recognized. The decrease in status can occur in the eyes of the interlocutor herself, as seen in cases of *stereotype threat*, or in the eyes of others in the epistemic community, as in the case of *implicit bias*. Both of these will be discussed as ways in which an ad hominem fallacy can constitute an *epistemic injustice*.

2.1 Introduction

An ad hominem fallacy is an error in reasoning in which an interlocutor attacks a person making an argument rather than the argument being made. These attacks address an irrelevant aspect of the person's character or circumstances rather than the argument the person herself makes, but purport to undermine the argument nevertheless. A wide variety of character traits and circumstances can constitute an ad hominem attack, but we will focus on attacks that draw on false identity-prejudicial stereotypes. This is so we can consider in more detail the effect that ad hominem fallacies can have when we consider the broader context in which such a fallacy is committed. At least in textbook treatments of informal logic, the focus tends to be on the identification of fallacies, many of which are presented in short paragraphs without any discussion of the context in which the dispute might be taking place. But in actual application, a fallacy is generally committed within a longer dialogue, which itself is occurring in a social context. They are also committed by individuals who have their own distinct backgrounds and character traits, and may occupy very

A. Yap (✉)

Department of Philosophy, University of Victoria, Victoria, BC, Canada
e-mail: ayap@uvic.ca

different places in society. When we pay attention to the bigger picture instead of looking only at a single passage in which a fallacy is committed, we can see more clearly the connections between fallacies and societal prejudices.

First, we should highlight several aspects of ad hominem fallacies that will be assumed in this paper, stemming from the idea that these fallacies are context-dependent. This means that what counts as an ad hominem attack in one context will not count as such in another context. Branding someone as a “liberal academic” and therefore incapable of understanding everyday experience would be an ad hominem attack given a politically conservative audience. But it would seem like a strange criticism of, say, a speaker at a philosophy conference. This is because an ad hominem attack will bring up something negative about an interlocutor, but what counts as a negative trait may vary depending on factors such as the parties’ respective backgrounds and the topic under discussion. Similarly, ad hominem fallacies are classified as fallacies of relevance, in which something irrelevant to the quality of the interlocutor’s argument is cited; but what counts as relevant to the argument will vary with context. For example, saying that a person lacks a university education is irrelevant if they are making an argument about how you should best fix your car, since university education typically does not address automotive repair. On the other hand, it is relevant if they are making a scientific argument, since scientists generally do generally need formal university education to be credible.

One account of ad hominem fallacies which accounts for this context-dependence, adapted from Yap (2013), is that ad hominem fallacies are situations in which a speaker’s argument is illegitimately treated as an instance of testimony. And the believability of an individual’s testimony is also context-dependent. We count people as knowledgeable testifiers in some areas (such as areas in which they have expertise), but not others. Similarly, we count people as trustworthy testifiers in some areas (such as areas in which they do not have a personal stake), but not others. These assumptions can easily overlap, but they do illustrate the importance of paying attention to the context of an argument. Many of them can be addressed by paying attention to the topic of the argument, but we will see that enlarging our scope and paying attention to further features of the context is also useful.

Once we situate informal fallacies in a larger context, a wide range of topics in argumentation opens up, although this paper will maintain a relatively narrow focus, looking only at ad hominem fallacies that attack people in ways that evoke identity prejudice. This perspective allows us to focus on the significant disruption they can cause to the dialogue as a whole, regardless of whether the fallacy is recognized as having been committed. This disruption may vary in degree and reparability. In most cases, the fallacy will do the most harm to the person against whom it is committed, but it can also have negative effects on others. Our examples will also focus principally on stereotypes prevalent in mainstream Western society, though different examples could certainly illustrate the same phenomena in societies with other sets of biases and stigmas.

The discussion of the effects of ad hominem fallacies will use several related concepts from psychology that have been getting increased attention in the philosophy literature, particularly *stereotype threat* and *implicit bias*. The following

section will give a brief outline of these concepts and show how they can impact individuals in the course of their everyday lives. We will then discuss the philosophical concept of epistemic injustice from Fricker (2007), and show how certain ad hominem fallacies can constitute an epistemic injustice. This will help showcase two ways in which deploying problematic stereotypes in the course of an argument can adversely affect its course. First, highlighting an individual's membership in a group that has false identity-prejudicial stereotypes associated with it can affect her self-perception in a way that is very difficult to counteract. This is the case in which epistemic injustice causes underperformance associated with stereotype threat, and may cause the individual to make her point less effectively than she might otherwise have been able to do. Second, it can also affect the way in which others in the broader epistemic community perceive her. This is the case in which epistemic injustice intersects with implicit bias. This is particularly relevant for situations in which an ad hominem fallacy is committed in the course of a public discussion. In these cases, the perceptions of individuals who are not direct participants in the argument may be important. And the occurrence of an ad hominem fallacy in a public discussion might, in the eyes of those observing the argument, diminish the epistemic credibility of one of its participants.

2.2 Stereotype Threat and Implicit Bias

Stereotype threat is a phenomenon described in Steele and Aronson (1995), in which invoking a negative stereotype about a group to which an individual belongs can cause that individual to perform below his or her actual ability. Calling attention to the fact that an individual belongs to a group stereotypically less skilled at a particular task can cause that person to perform more poorly at it. The original study considers African-Americans' performance on standard aptitude tests, but many other studies have been conducted since then. Other studies have considered negative stereotypes about women's mathematical aptitude and related them to women and girls' performance on math tests (Spencer et al. 1999; Ambady et al. 2001). In general, what such studies have found is that negative stereotypes, particularly when highlighted, can become self-confirming.

We can put this in terms of ability by considering several stereotypes about different groups and their capacities. For instance, women are often stereotyped as being worse at math, the elderly as being worse drivers, and African-Americans as being worse academically. When a member of one of these groups finds themselves faced with a task associated with a negative stereotype, their performance risks being evaluated in terms of that stereotype. More specifically, if a woman does poorly in a math class, some might simply explain this in terms of her gender's lower ability, rather than her personal circumstances or even just her *individual* ability, independent of gender. But the pressure from this threat might be what leads to her poor performance, or even her choosing not to take the class in the first place.

However, several points about stereotype threat ought to be highlighted. First, one does not have to endorse the negative stereotype to be affected by it, so long as it is a recognizable stereotype in one's culture. Women who do not believe that gender affects mathematical ability can nevertheless underperform as a result of stereotype threat. It is less a matter of our own self-conception than of our perception of the way in which others might see us. Being labeled as an individual who is rationally inferior, or less skilled in argumentation, can become self-confirming for an individual previously confident in her own abilities.

Second, many people belong to several different groups to which stereotypes are associated, some of which may conflict with each other. What makes a study such as Ambady et al. (2001) particularly interesting is their investigation into exactly this phenomenon, which looks at mathematical performance among Asian-American girls. Asians are typically stereotyped as being good at math, while girls are typically stereotyped as being bad at it. The girls in the study were first asked to color a randomly selected picture before taking a standardized math test. The three pictures girls could have received to color were intended to activate their female identity (a girl holding a doll), their Asian identity (two Asian children eating from rice bowls), or neither (a landscape). For most age groups, the best performances were among the girls whose ethnic identity was activated, and the lowest among girls whose gender identity was activated, with the control group intermediate between the two.¹ So due to the complex nature of many people's identity, it is possible to affect performance on certain tasks by activating one stereotype or another about a group to which they belong.

The second psychological concept we will discuss is *implicit bias*. Where stereotype threat has largely to do with a person's views about how she will be perceived, implicit bias has to do with the way in which others actually do see her. We will look primarily at ways in which implicit bias can affect others' judgments of credibility about an individual. Now, judgments of credibility are not always conscious, and especially when unconscious, may be affected by negative stereotypes having to do with a person's identity. For example, studies of implicit bias have shown that factors such as race and gender can affect even well-meaning individuals' assessment of job candidates. One study found that fictitious resumes of identical quality sent out to employers were much more likely to receive callbacks if they were attached to a traditionally white name than if they were attached to a traditionally African-American name. This was even the case among employers who explicitly state that they are equal opportunity (Bertrand and Mullainathan 2004). Another similar study looked at the effects of gender, by sending identical CVs to various academic psychologists for evaluation, but varying the name. Some were given typically male names and others, typically female names. In general, the finding was that the CVs with male names were evaluated more highly than their identical counterparts with female names attached. Also important is that there was no significant difference between men and women's evaluations of the CVs – both had a tendency to rank the male candidates more highly (Steinpreis et al. 1999). So judgements made by

¹There was admittedly one age group in which this order was reversed.

members of marginalized groups may still be affected by negative stereotypes, even when those are stereotypes about a group to which they belong.

This last fact may seem counterintuitive, but an important aspect of this type of bias is that it tends to manifest itself in ways that the biased person is typically unaware of. What makes it a particularly difficult thing to combat, or even mitigate, is that people who do have implicit biases do not generally see themselves as being influenced by bias. For instance, the *bias blind spot* is the commonly held (but mistaken) belief that one's own judgments are less susceptible to bias than the judgments of others (Pronin et al. 2002; Ehrlinger et al. 2005). This means that even under very good conditions, in which we have a well-meaning person who does not harbor conscious prejudice, and is even aware of biases to which she might be susceptible, we still see the effects of implicit bias. Now, in order to articulate some of the harms that can result from these psychological phenomena, we will turn to the concept of *epistemic injustice*.

2.3 Epistemic Injustice

Epistemic injustice, as discussed in Fricker (2007) in particular, is a kind of epistemic wrong done to an individual, in her capacity as a knower, as a result of systemic injustice. Her main focus is on testimonial injustice, which stems from our often unconscious assessments of a speaker's credibility. Literature on the epistemology of testimony does not give a uniform account of the manner in which we come to accept testimonial evidence, but it is acknowledged that some judgment on our part, whether explicit or implicit, of the testifier's credibility plays a role. Put simply, we are less likely to accept a claim if we do not see the person making it as credible. And prejudice can result in a person's being assigned a lower degree of credibility solely on the basis of a negative stereotype about a group to which she belongs. There are many ways in which this can actually happen – probably as many as there are factors involved the assessment of credibility. However, trustworthiness and competence can be singled out as important dimensions of credibility assessment, and both can be negatively impacted by prejudice. African-American males in North America are often unfairly criminalized, and this negative stereotype can affect assessments of trustworthiness. In different situations, members of racial groups who have negative stereotypes assorted with business practices might be assessed as less trustworthy than people who are not members of those groups. Similarly, there are negative stereotypes about competence at particular tasks. We have already mentioned negative stereotypes about women and math performance, but we will shortly discuss problematic stereotypes about gender and rationality that can cause women to be negatively evaluated. Fricker, in her book, makes use of an example from the screenplay from the film *The Talented Mr Ripley*, in which a woman is told “Marge, there's female intuition, and then there are facts.” (Fricker 2007, p. 88) Fricker discusses this instance of testimonial injustice in more detail than will be covered here, but it illustrates the point, at least, that identity prejudice can seriously affect the reception of a person's claims. In this case, Marge, despite

intimate knowledge of the subject in question, is dismissed because of her gender, and her views are discounted.

There has been some work done in adapting this idea to arguments, and developing a concept of *argumentative injustice* (Bondy 2010). This is an analogous concept to Fricker's in that it involves harm done to an individual due to false identity-prejudicial stereotypes. However, instead of harming someone as a knower, it harms her as a reasoner, or someone capable of drawing conclusions from premises. While Bondy does cite some disanalogies between his concept and Fricker's, the issues under discussion in this paper could easily be discussed in terms of either or both.² Particularly when we consider the close relationship between ad hominem fallacies and testimony, it ought not matter too much which term we use to talk about the injustice being done – whether it is a wrong to the person as an arguer or as a source of good information. So at least in this particular case, testimonial injustice and argumentative injustice intersect. As such, we will continue to use the original term “epistemic injustice,” recognizing that our examples fall into both categories.

2.4 Fallacies in Dialogue: Bill and Sue

Some treatments of fallacies do consider their effect on dialogues in general. One particularly good treatment is Woods and Walton (1982), in which we see disagreements between two agents in a romantic relationship: Bill and Sue. Woods and Walton use these characters as part of a running example in order to illustrate different ways in which agents might disagree. For instance, they provide examples of their disagreeing about the facts, such as what Bill might have said on a particular occasion. They also provide examples of their drawing different conclusions from the same facts. The former is called premissory instability, and the latter, conclusionary instability. These concepts are used to show when an argument becomes a *quarrel*, which is often what the word “argument” is taken to mean in ordinary language contexts. Quarrels, however, are typically unproductive and unpleasant.

If, as in the case of premissory instability, we cannot even get started on the road to agreement, then frustration, accusation, and hurt feelings are bound to occur. References will tend to become personal and disagreeable. Sue might eventually complain that if Bill can't recall what he said last Friday, then he is a simpleton; Bill might retort that Sue is a hysterical shrew. Before you know it, things will have taken another nasty turn. Similarly, having got the discussion nicely under way with some basic premissory agreement, things might come grinding to a halt owing to a lack of common conclusions. Then the same personal disruptions could occur. Bill might contend that Sue shows herself to be a “typical woman” in having no capacity to reason beyond her nose, or to perceive what follows from what. And Sue may earnestly offer to slap Bill's moronic face (and perhaps be forgiven for it.) (Woods and Walton 1982, p. 4)

²One exception is that Bondy allows for argumentative injustice to involve credibility excesses rather than just credibility deficits, which is something I will not address. In this work, I will only consider cases of credibility deficit as a result of injustice.

The Bill and Sue example also serves the purpose of illustrating some fallacies that can occur in the course of an argument, particularly when it becomes a quarrel. Obviously, threatening to slap someone's face is an appeal to force, and a poor argumentative move. However, we also see several cases of personal insults, or ad hominem attacks. These are also fairly obvious, especially when we are primed to look for such things. For example, "simpleton" and "hysterical shrew" are both given as examples of insulting phrases that are irrelevant to the quality of someone's argument. But we might want to think again before simply accepting them as examples of ad hominem fallacies and moving on. And what about the accusation of being a typical woman? There is some initial difficulty in seeing this as a proper ad hominem attack, because at least according to the criteria we set out above, being a woman has to be seen as a negative trait in this context. But what is problematic is the characterization of a typical woman, not the fact of Sue's being a woman. There is more to be said about this case than simply the fact that fallacies are being committed, and tempers are being lost. We will take the three reasoning errors individually.

First, there is the accusation that Bill is a singleton for not being able to recall what he said at an earlier time. This is clearly an insult, but is it relevant to the quality of his argument? In the context of this argument, perhaps not, but a minor modification could make it seem relevant. In this particular case, Bill's being a singleton is a consequence of Sue's belief that he is simply wrong about what he said on Friday. So the insult is predicated on his having said something false, and only further demonstrates the fact that the two interlocutors are disagreeing about the truth of the premises of an argument: what it was that Bill actually said. As such, it does not perfectly fit the model of an ad hominem attack. In a typical ad hominem attack, someone's argument is discredited on the basis of an irrelevant negative characteristic that he is said to possess. But if Sue's claim had been that, since Bill is a singleton, he is probably misremembering what he said last Friday, the deficiency is relevant to the argument. It would, of course, have been better if instead of accusing Bill of being a singleton, Sue had more specifically accused him of having a terrible memory. If it is in fact true that Bill's memory is bad, this is bound to have a lasting effect on his credibility in future discourse, assuming that his testimony or the truth of his premises is based on his memory of the facts. But despite the lasting effects and Bill's likely credibility deficit, this is not a real case of epistemic injustice in Fricker's sense, even if the claim is false. Even though this does harm Bill in his capacity as a knower, the wrong is not based on any kind of structural injustice. No negative stereotypes have been invoked, and there is nothing about Bill's identity that is connected to the claim that he is less than intelligent.

Now we turn to the attacks on Sue, which are connected in that both evoke problematic stereotypes about women and rationality. The first is Bill's retort that Sue is a hysterical shrew. While it does not explicitly raise the issue of gender, there is a gendered quality to the label "hysterical shrew" that is not really present in calling someone a singleton.³ Both men and women could be singletons, but it seems that

³Though the label "singleton" arguably brings up problematic stereotypes about disability, making a more intersectional analysis desirable, for the sake of simplicity here, we will suppose that neither Bill nor Sue is cognitively disabled.

only women are called shrews, and it is rare to say that a man is being hysterical. Even though the fallacy in the accusation is obvious, it still renders gender salient to the dispute in a way that it might not have been before.

The last ad hominem attack of the passage state that Sue is a typical woman, and is therefore incapable of reasoning properly. There are at least two features of this attack that distinguish it from the previous two. First, being a woman is not an obviously negative trait (or at least should not be!), where a simpleton or a hysterical shrew is easily recognizable as something we would not want to be. While being incapable of reasoning properly is clearly something negative, note that it is supposed to follow from a trait (gender) that we do not obviously recognize as being negative. Second, if women were less capable of proper reasoning, this would not really be an ad hominem fallacy, since it would be very relevant to the argument. Pointing out that one's argumentative opponent is somehow lacking in their ability to reason and think through consequences is actually relevant to whether or not they should be taken seriously. As an illustration of this, note that if one was engaged in an argument with someone (of any gender) and said, "Look, you've had a lot of alcohol tonight, and so you're being totally irrational," this would not count as an ad hominem fallacy. There are plenty of things that could impair someone's ability to reason, such as drugs, alcohol, injury, or illness, and bringing them up as a reason to take that person's argument less seriously does not seem properly fallacious. But of course what makes this case different from dismissing someone because they've had too much to drink is that the latter case allows for the possibility of revisiting the discussion later, when the person has sobered up. It is not common for someone to change genders, and I suspect that people who say things like Bill did in this argument would not also be thinking of revisiting the argument after such a change.

So this needs to be further broken down. Here we have a case of an accusation that is in part true, since Sue is a woman, and would be relevant if entirely true, since someone's ability to reason is relevant to the quality of their argument. An alternative diagnosis of the problem is that we do not have an ad hominem fallacy, but a false claim built in to the accusation in the first place, namely that women are poor reasoners. This really depends on how we treat the characterization of a "typical woman." If we take it as part of the attack, then the charge against Sue is just false, since the characterization of women that it depends on is just false. On the other hand, if we take it as a background assumption, then we can see it as an ad hominem fallacy, since being a woman is irrelevant to one's ability to reason, though Bill is falsely treating it as a relevant factor. Also, this is a case of epistemic and argumentative injustice, generally wronging Sue in her capacity as a participant in this dialogue. The reason why the authors are able to use this as an example of an ad hominem fallacy in the first place is that the stereotype of women as being less rational is a recognizable one, even if we do not endorse it. If Bill had said that Sue is a typical brown-eyed person and therefore unable to reason properly, it would not have done a particularly good pedagogical job, since there are no common stereotypes about brown-eyed people being poor reasoners.

Further, given the literature on stereotype threat, we might worry that calling attention to a negative stereotype about women and rationality might have a negative effect on the female participant in the discussion. But we need to be careful about

just how we characterize this phenomenon, particularly since the causal mechanism that results in underperformance is not quite understood at this point. Still, note that what happens in next in the story is both plausible and in some sense a confirmation of the stereotype, namely an appeal to force. In making this move, Sue gives up on rational argument, and threatens to slap Bill. It is telling that the person against whom a stereotype about rationality is deployed immediately resorts to an irrational response. Of course this is just a story, but it could easily have been an actual interaction.

Another thing to talk about, then, is what an alternative next part of the story could have been instead of a slap. Walton and Woods use this as an example of a way in which tensions can escalate in a quarrel, but what, if anything, could salvage this argument? Bill could show that his memory is perfectly good, and Sue might be able to show herself to be calm and collected, but how could she show that the last ad hominem attack is unjustified? In the previous two cases, it was possible to show that the negative trait ascribed was inapplicable, but in this case, Sue certainly is a woman. What is false is the assumption that her being a woman makes her less capable of producing a proper argument. It seems very unlikely that anything Sue could do would conclusively show the falseness of the stereotype generally, and it does not seem much more likely that she would even be able to combat it in this individual instance.

The problem is that once her rationality has been undermined, Sue's prospects for rationally defending herself obviously diminish. There is now an easy way to dismiss any further counterargument that she gives as a further manifestation of her irrationality, and thus not worth considering as a serious point in a debate. This is largely because what she has to argue against is the view that women are irrational. No easy demonstration is available to show that typical women are perfectly good reasoners. So her principal argumentative resource has been removed, and Sue may easily find herself appealing to force or emotion, or committing some other kind of fallacy, because it has become the only way for her to make a point heard. Notice, though, that this is a potential mechanism for the underperformance effect of stereotype threat. When a person's capacity to engage as a rational agent has been undermined by deploying a stereotype, they may find themselves confirming that stereotype because they are no longer accepted in the discourse as a rational agent. More simply, underperformance in this particular way may be their only way to stay in the conversation because of the epistemic injustice that has been done.

If Sue's prospects for defending herself using only her own resources are poor, what if Bill apologizes for the sexist remark, or he is called out by a third party? Can this correct the epistemic injustice? Does it neutralize the problem, and allow Sue back into the dialogue as an equal participant? Not necessarily. Bill can certainly take back what he said, either because he regrets it or because of someone else's intervention, but issues of gender and rationality have now been rendered salient to the argument. Is there then any way for someone hearing their argument to see Sue just as a reasoner, and not as a female reasoner? This is the place where issues of implicit bias become relevant, as we see just how difficult it is for people, even those people who express a commitment to treating men and women equally, to really do

so. This may have been the case even before gender was explicitly introduced, but is certainly so at this point in the argument. Implicit bias, by its very nature, is extremely difficult to switch off. And we have already seen that there are negative stereotypes about women and rationality. Once a woman has been labeled as an irrational female in an argument, the threat of the label remains for her. These features of the situation are what really make it an injustice in Fricker's sense – something that does epistemic harm to Sue.

It might be arguable that any case of an *ad hominem* attack does some epistemic harm to an interlocutor. I would be happy to grant this point, but nevertheless would maintain that there is a real difference between this last case and the others due to the irreparability of the damage done to the discourse as a whole. Suppose Bill had claimed instead that she was revealing herself to be a typical brown-eyed person and therefore a bad reasoner. This is an *incidental*, rather than *systematic* case of testimonial injustice. A prejudice against the reasoning powers of brown-eyed people is unusual, and though it might cause significant problems for Sue in the course of this argument, its effects will most likely be quite localized to her interactions with Bill. On the other hand, a prejudice related to women and rationality will likely affect Sue in many areas of her life:

Systematic testimonial injustices, then, are produced not by prejudice *simpliciter*, but specifically by those prejudices that track the subject through different dimensions of social activity – economic, educational, professional, sexual, legal, political, religious, and so on. Being subject to a tracker prejudice renders one susceptible not only to testimonial injustice but to a gamut of different injustices, and so when such a prejudice generates a testimonial injustice, that injustice is systematically connected with other kinds of actual or potential injustice (Fricker 2007, p. 27).

The fact that a testimonial injustice is systematic is significant for two main reasons. First, we are also concerned with the effects of the fallacy on outside participants to the dialogue. A prejudice against brown-eyed people is unlikely to be shared by a wide segment of the population, whereas prejudices about gender are common (though in many cases unconscious). So a brown-eyed person is unlikely to be affected by implicit bias against brown-eyed people, but a woman is likely to be affected by implicit sexism. Second, the confidence-eroding effects of testimonial injustice are much more significant when a person has been consistently subject to it. Even if Bill has not expressed sentiments like this in the past, if Sue has found herself being discounted, or treated as less rational, because of her gender, an attack such as this will contribute to an already substantial harm. Even though this paper is focusing primarily on instances of one-off testimonial injustices, or at least injustices committed in the course of a single dialogue, the line between long-term injustice and one-off injustice can become blurry in many situations. And even in a one-off situation, Fricker writes that “the recipient of a one-off testimonial injustice may lose confidence in his belief, or in his justification for it, so that he ceases to satisfy the conditions for knowledge” (Fricker 2007, p. 47). This means that the (perhaps cumulative) epistemic harm might render things such that Sue is no longer capable of acting as a rational participant in the dialogue – hence the appeal to force.

Thus far, we have only looked at a single case of epistemic injustice and looked at its problematic effects, but the comments about the case of Bill and Sue certainly generalize to many other situations. There are certain fallacies whose negative effects on an argument may be counteracted. Someone may be able to show that a negative stereotype is inapplicable to them, because they do not actually belong to the group being stereotyped. However, if the problem is one of showing that the stereotype is inaccurate, this is a problem that requires much more than a single exchange. We can also talk more generally about ways in which ad hominem attacks might constitute an epistemic injustice against a participant in a discussion. As we alluded to earlier, there are two main problematic effects of ad hominem attacks that invoke identity-prejudicial stereotypes. First, there is the epistemic harm done to the individual who is being attacked. Stereotype threat and the cumulative effects of epistemic injustice can cause a person to become a worse participant in the dialogue. This may result in her becoming less sure of her beliefs, ultimately failing to satisfy the conditions for knowledge, or may leave her with too few resources with which to engage as a legitimate participant in the discussion. Second, there is the potential for implicit bias in outside observers, once the negative stereotype has been rendered salient to the discussion.

Even if people do attempt to discount stereotypes, they may nevertheless have significant effects in their assessment of the situation, and of the merits of each individual's arguments. The anchoring effect is a phenomenon in which people, when primed with certain pre-established categories or amounts, tend to produce estimates which are closer to those categories or amounts than those who are not primed (Slovic 1967; Tversky and Kahneman 1974). For instance, Desmarais and Bruce (2010) found that sports commentary that invokes stereotypes influences viewers' interpretation of the game being played. It seems entirely plausible that stereotypes could influence observers' interpretation of an argument taking place in front of them without their being aware of this influence.

Regardless of whether the effects on Sue are visible to the other participants, we can at least acknowledge that she now bears a burden in the debate that Bill does not. She has to be more careful than he does to be even-tempered and rational, lest she be seen as a hysterical woman. This is a burden that has been unfairly placed upon her in the debate due to her gender. More specifically, the fact that Bill's ad hominem attack has made her gender salient to the argument they are having. She may admittedly choose not to try to take up this challenge, and continue to argue as before, but for all involved parties (including most likely herself) she is at risk of being evaluated more harshly if she fails to meet it. What this means practically speaking is that Bill may be permitted to make an appeal to emotion in the course of their argument and have that be considered a relatively acceptable, if not optimal, argumentative move. However, Sue's making the same emotional appeal would likely result in her being viewed negatively, as being overly emotional and possibly hysterical. This effect might become obvious to observers if both Bill and Sue were to make an identical appeal, but such a situation seems unlikely to arise in the course of any real life argument.

2.5 The Credibility of Female Attorneys

Epistemic injustice can arise in the course of ordinary dialogue, as in the previous section, but it can also have significant effects in legal contexts as well. A case study of tactics used by attorneys in the courtroom showed a variety of credibility lessening tactics used against opposing counsels. One particular dimension of this study looked at the ways in which these credibility attacks were gendered. Based on gender bias reports as well as anecdotal evidence, Ubel (2008) conducted a survey of Kansas attorneys asking about credibility lessening tactics, described as “any tactic in which an attorney uses speech or actions to negatively impact the credibility of another attorney in court.” While the participants were only asked to describe situations in which such tactics had been used, the analysis classified them into eight categories that they identified. The two most relevant to our purposes are Experience and Reference Gender, since they specifically attack aspects of the opposing counsel’s identity: age and gender, respectively. We will focus on the latter.

Anecdotal evidence and earlier studies mention sexist remarks, derogatory treatment, inappropriate forms of address, references to female stereotypes, foul language, cute names, and making references to physical appearance (Ubel 2008, p. 44). Some of these appeared in Ubel’s study. As examples of responses that were coded as Reference Gender, (Ubel 2008, p. 47) gives the following:

- Sometimes older (much older) male attorneys will call you “honey” or “lady lawyer”
- Referring to me as “little lady,” “young lady”
- When picking my first felony jury, the prosecutor announced to the jury I was 5 months pregnant. He asked the jury if this would influence their decisions.

Ubel found that while 15 % of the tactics that female respondents reported were classified as Reference Gender, no males reported their gender being referenced in order to lessen their credibility. Further, no one mentioned using this tactic against another attorney (Ubel 2008, p. 49). This study did have its limitations, however. While the gender breakdown of respondents was similar to that of Kansas attorneys, the study was obviously geographically constrained and self-reported. Further, the extent to which these tactics were successful was impossible to measure. It may have been that in some cases, the credibility of the attacker was lessened more than the credibility of the one under attack.

However, in light of stereotypes about the gendered nature of rationality, and about women being more emotionally governed, it seems very plausible that many of the Reference Gender attacks would have had very much the desired effect, and further, because of the unconscious nature of implicit bias, listeners may not have been aware that they were affected. These are real cases in which some of the hypothetical tactics outlined in the previous section against Sue have been used to commit an epistemic injustice. The next section, however, will turn to situations in which issues of credibility and identity are much more complex and difficult to untangle.

2.6 “Authentic” Victims and Credibility

In cases of sexual assault, perceived credibility of victims is an extremely salient issue. While the gender of an attorney is irrelevant to the quality of her arguments, aspects of an individual’s identity can be more easily seen as relevant to her credibility. So this section will look at ways in which attacks against an individual evoking aspects of their identity can result in unfair credibility deficits and in such a way constitute epistemic injustice. In a well-known Canadian case in which a man was accused of sexually assaulting a young woman who he was interviewing for a job. Justice McClung remarked that the 17-year old complainant did not present herself to the accused in “a bonnet and crinolines” – a statement duly criticized by another Supreme Court judge, Justice L’Heureux-Dubé (*R v. Ewanchuk* 1999). While the accused, Ewanchuk, was acquitted, and the acquittal upheld on appeal as per the views of Justice McClung, the appeal was later overturned. The trial ruling as well as McClung’s ruling, were based on the idea of “implied consent,” that the complainant’s behaviour and lack of resistance to some of the accused’s advances could objectively be construed as consent.

The judges who overturned McClung’s ruling did so on several grounds – some on the more purely legal grounds that there was no implied consent defence, and that the accused’s behaviour made it clear that he understood that his advances were unwanted. However, L’Heureux-Dubé’s remarks pointed out instances in which McClung’s remarks about the complainant’s character were problematic, and that we can recognize as cases of ad hominem attacks that contribute to epistemic injustice. These create tension with the fact that the trial judges initially did find the complainant to be a credible witness. In addition to McClung’s remarks about the lack of “bonnet and crinolines,” he also pointed out that she was the mother of a 6-month-old baby, and shared an apartment with her boyfriend and another couple. In response to this, L’Heureux-Dubé wrote:

Even though McClung J.A. asserted that he had no intention of denigrating the complainant, one might wonder why he felt necessary to point out these aspects of the trial record. Could it be to express that the complainant is not a virgin? Or that she is a person of questionable moral character because she is not married and lives with her boyfriend and another couple? These comments made by an appellate judge help reinforce the myth that under such circumstances, either the complainant is less worthy of belief, she invited the sexual assault, or her sexual experience signals probable consent to further sexual activity. Based on those attributed assumptions, the implication is that if the complainant articulates her lack of consent by saying “no”, she really does not mean it and even if she does, her refusal cannot be taken as seriously as if she were a girl of “good” moral character. (*R v. Ewanchuk* 1999)

Based on what we have seen thus far about the pervasiveness of stereotypes, even if someone claims that these are not being pointed out in order to reduce the complainant’s credibility, they can still very easily have that effect, and L’Heureux-Dubé is quite right to connect them to the myth that, on some occasions, “no” might mean “yes.” Since this case, some research has been done on the concept of the “ideal victim” in sexual assault cases, and the extent to which assertions about a complainant’s character can affect assessments of her credibility, even if they are

not framed as such (and even if, as in Ewanchuk's case, credibility has supposedly already been established.)

In some aspects of sexual assault cases, credibility judgments are explicit, for instance in police assessments of the believability of rape reports. Randall (2010) discusses several situations in which police disbelieved several women's rape reports on account of their demeanor. We will focus more on credibility attacks in trial contexts, however, in which aspects of a woman's background can be raised in order to discredit her. One egregious example of this is the view that sex workers, by the nature of their work, cannot be raped. This is in part due to a credibility deficit due to their identity; but women who are in a relationship with their assailant will also be discredited along similar lines, due to "the (mistaken) assumption of 'continuous' or 'implied' consent given by women in these situations" (Randall 2010, p. 409). However, there are other ways in which women's credibility can be attacked that have little or nothing to do with the idea of implied consent. Women who are already socially marginalized (perhaps because they are sex workers, but also perhaps due to issues of race or class) can often be seen as less "authentic" victims of rape. Randall cites an Australian study (discussed in more detail in Cossins (2003)) investigating the way in which adult female sexual assault victims are treated in the courtroom, with a particular focus on the treatment of black and Aboriginal women:

The analysis showed that the credibility testing of the victims was compounded by cultural and language problems for Aboriginal women, who were subjected to a significantly greater and more intense amount of defence questioning their drinking, drug use, lying, and the levels of casual sexual relations in their communities. The more hostile and racist the credibility assaults, the more distressing and traumatizing the trial process is for rape complainants, creating a vicious circle such that their very distress undermines their ability to "hold up" under legal interrogation in a way that is seen to be credible. (Randall 2010, p. 410–1)

This study raises clear worries of both stereotype threat and implicit (perhaps not even implicit) bias. The way in which victims often broke down under hostile and racist questioning is even more extreme than the usual underperformance effect described in studies of stereotype threat. Further, the questions drinking and drug use clearly invoke certain problematic stereotypes and render them salient to listeners at the trial. The study even notes that a Crown Prosecutor remarked to the judge, "these are not educated people," in reference to the Aboriginal woman who was the complainant (Cossins 2003, p. 80). The fact that these stereotypes are even invoked by the prosecution is striking, since it shows us the extent to which they are seen as relevant to the decision. Had this been a remark by the defence, it could easily have been labeled an *ad hominem* attack. After all, a woman's level of education is likely irrelevant to her ability to provide accurate testimony about personal events, but could prejudice listeners against her regardless.

Now it may seem difficult to separate *ad hominem* attacks from truly relevant concerns in sexual assault cases, since personal testimony about events plays such a significant part in the evaluation of what in fact happened. However, the asymmetry with which different groups face credibility attacks makes it very likely that something problematic is happening. Indeed, the very concept of the "ideal victim" makes it clear that some victims of sexual assault will find it harder to make their

cases than others in ways that have nothing to do with the facts of the situation, merely their social identity.

2.7 Conclusion

The story thus far has been primarily a pessimistic one, about the fact that negative stereotypes and the epistemic injustice associated with their use in arguments, cannot simply be ignored. Once they have come into play in an argument, they render certain features of a participant salient to the discourse in question. We have also seen that there is very little that an individual herself can do once being subjected to an epistemic injustice, to correct or even improve her argumentative situation. Further, the psychology literature is both extensive and mixed when it comes to the possibility of becoming unbiased individuals, or successfully correcting for biases that we know we might possess. Some articles are extremely pessimistic about the possibility of bias correction (Wilson and Brekke 1994; Wegner 1994; Sanna et al. 2002). But despite this, certain biases do have certain strategies that work to some degree (Anderson and Sechler 1986; Pettigrew 1998). However, since different biases are mitigated by different strategies, there cannot be an across-the-board solution that could be implemented for cases in which identity prejudicial stereotypes can interfere with the course of an argument. There is no clear way in which an individual can defend herself against an epistemic harm done to her. We might just be lucky in some cases, and people outside of the dialogue might accord less credibility to the person making the prejudicial ad hominem attack, which could help balance out the issues of bias.

Surprisingly, one of the few sources of hope for defending oneself against ad hominem attacks on credibility can be found in the literature on “ideal” victims of sexual assault. While much of this literature focuses on issues of identity, Larcombe (2002) provides a different perspective, in which a victim’s ability to demonstrate resistance during the trial process itself might enhance her credibility rather than damage it. We have already discussed ways in which defence lawyers in trials can frequently, and in a hostile fashion, attempt to discredit a witness. However, if she is able to resist the underperformance effects of stereotype threat, she may be able to turn the situation to her advantage:

if she can hold up under the pressure, if she can withstand the defence counsel’s seductive and/or aggressive attempts to impose an alternative/normative account, if she can resist their attempts to take control and determine the course of events; if she can stick with her version of what happened and is clear about what she said, felt, and wanted – all in the face of explicit and calculated attempts to trip her up – she will have represented herself not only as a persuasive and credible witness but, more importantly, as a victimized yet resistant female subject. (Larcombe 2002, p. 142)

The reason this works, Larcombe reasons, is that this allows the jury to observe a scenario of the victim’s firm non-consent, which makes it easier for them to picture an analogous scenario as having taken place in the past. This can make her account

of non-consent to the accused's advances more plausible. But of course, while there be an upside to credibility attacks in this specific situation, turning it to her advantage still requires a tremendous effort on the part of the victim of these attacks. However, Larcombe does also mention one situation in which a judge intervened on behalf of a victim who was being examined in a particularly aggressive fashion, and rebuked the defence lawyer for his conduct. Perhaps it can be in the power of authoritative outside parties to ameliorate the negative effects of ad hominem attacks and reduce the epistemic harms being done. Those who already have been accorded significant credibility would do well to speak up on the part of those who may be likely to suffer an epistemic injustice; this may be the best solution we have so far.

References

- Ambady, N., M. Shih, A. Kim, and T.L. Pittinsky. 2001. Stereotype susceptibility in children: Effects of identity activation on quantitative performance. *Psychological Science* 12(5): 385–390.
- Anderson, C.A., and E.S. Sechler. 1986. Effects of explanation and counterexplanation on the development and use of social theories. *Journal of Personality and Social Psychology* 50(1): 24–34.
- Bertrand, M., and S. Mullainathan. 2004. Are Emily and Greg more employable than Lakisha and Jamal? A field experiment on labor market discrimination. *American Economic Review* 94(4): 991–1013.
- Bondy, P. 2010. Argumentative injustice. *Informal Logic* 30(3): 263–278.
- Cossins, A. 2003. Saints, sluts, and sexual assault: Rethinking the relationship between sex, race and gender. *Social and Legal Studies* 12(1): 77–103.
- Desmarais, F., and T. Bruce. 2010. The power of stereotypes: Anchoring images through language in live sports broadcasts. *Journal of Language and Social Psychology* 29(3): 338–362.
- Ehrlinger, J., T. Gilovich, and L. Ross. 2005. Peering into the bias blind spot: People's assessments of bias in themselves and others. *Personality and Social Psychology Bulletin* 31(5): 680–692.
- Ewanchuk, R. v. 1999. 1 SCR 330. Retrieved from the Supreme Court of Canada website: <http://scc-csc.lexum.com/decisia-scc-csc/scc-csc/scc-csc/en/item/1684/index.do>.
- Fricker, M. 2007. *Epistemic injustice: Power and the ethics of knowing*. New York: Oxford University Press.
- Larcombe, W. 2002. The 'ideal' victim v successful rape complaints: Not what you might expect. *Feminist Legal Studies* 10: 131–148.
- Pettigrew, T.F. 1998. Intergroup contact theory. *Annual Review of Psychology* 49(1): 65–85.
- Pronin, E., D.Y. Lin, and L. Ross. 2002. The bias blind spot: Perceptions of bias in self versus others. *Personality and Social Psychology Bulletin* 28(3): 369–381.
- Randall, M. 2010. Sexual assault law, credibility, and "ideal victims": Consent, resistance, and victim blaming. *Canadian Journal of Women and the Law* 22(2): 397–434.
- Sanna, L.J., N. Schwarz, and S.L. Stocker. 2002. When debiasing backfires: Accessible content and accessibility experiences in debiasing hindsight. *Journal of Experimental Psychology: Learning, Memory, and Cognition* 28(3): 497–502.
- Slovic, P. 1967. The relative influence of probabilities and payoffs upon perceived risk of a gamble. *Psychonomic Science* 9(4): 223–224.
- Spencer, S.J., C.M. Steele, and D.M. Quinn. 1999. Stereotype threat and women's math performance. *Journal of Experimental Social Psychology* 35: 4–28.
- Steele, C.M., and J. Aronson. 1995. Stereotype threat and the intellectual test performance of African Americans. *Journal of Personality and Social Psychology* 69(5): 797–811.

- Steinpreis, R.E., K.A. Anders, and D. Ritzke. 1999. The impact of gender on the review of the curricula vitae of job applicants and tenure candidates: A national empirical study. *Sex Roles* 41(7–8): 509–528.
- Tversky, A., and D. Kahneman. 1974. Judgment under uncertainty: Heuristics and biases. *Science* 185(4157): 1124–1131.
- Ubel, S. 2008. Credibility lessening tactics utilized in the courtroom by male and female attorneys. *Communication Law Review* 42(2): 42–51.
- Wegner, D.M. 1994. Ironic processes of mental control. *Psychological Review* 101(1): 34–52.
- Wilson, T.D., and N. Brekke. 1994. Mental contamination and mental correction: Unwanted influences on judgments and evaluations. *Psychological Bulletin* 116(1): 117–142.
- Woods, J. And, and D. Walton. 1982. *Argument: The logic of the fallacies*. Toronto: McGraw-Hill Ryerson.
- Yap, A. 2013. Ad hominem fallacies, bias, and testimony. *Argumentation* 27(2): 97–109.

Argument Types and Fallacies in Legal Argumentation

Bustamante, Th.; Dahlman, C. (Eds.)

2015, XVI, 222 p. 6 illus., 1 illus. in color., Hardcover

ISBN: 978-3-319-16147-1