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EPISTEMIC INJUSTICE AND THE CONSTRUCTION OF TRANSGENDER LEGAL SUBJECTS

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Abstract:

Using cases and legal precedent on transgender employment discrimination in the US-American context, this article investigates the epistemological consequences of creating a gendered legal subject. It interrogates the ways that courts enact certain kinds of knowledge claims that deny the experiences of transgender litigants as transgender. It argues how judicial reasoning tends to create conditions of transgender legibility that reproduces pre-conceived notions of normative, cisgender sex/gender experiences and knowledges, contributing to hermeneutical injustice.

Introduction

This article examines how transgender litigants experience epistemic injustice in the US-American court system.¹ It argues that since knowledge is “generated from histories, social relations, and practices of communities,” the epistemological consequences of translating transgender experiences and knowledges into legal discourse require serious investigation (Nelson, 1993, p. 126). Epistemic injustice, as Miranda Fricker (2007) defines it, may happen when knowers are discredited for their claims to knowledge and/or when knowers who, needing to make sense of their experiences, lack the interpretative resources to do so – that is to say, they lack a grammar or vocabulary by which to make their experience legible. Fricker (2007) urged her readers to consider not only what she calls good epistemic conduct but to overcome these epistemic injustices, but also “to lay the foundation of correlative institutional virtues – virtues possessed, for instance, by the

judiciary” (p. 176). The present article is a gesture in that direction.

Transgender experiences are often translated through an unacknowledged epistemic commitment to a cisgender gender/sex paradigm. Cisgender is a term that describes a person whose gender identity “matches” their birth-assigned sex. It is meant to replace the negative and potentially naturalizing connotations of “non-transgender” (Aultman, 2014). Although many theorists agree that gender, following Susan Stryker’s (2008) definition, “is thought to be cultural” whereas sex “is thought to be biological” (p. 11), they are both, however, linked by cultural and social norms.² When a culture naturalizes cisgender formulations and experiences of gender/sex, i.e., normalizes them, it constitutes a cisgender gender/sex paradigm. This article argues that particular forms of rationality and legal objectivity that are peculiar to judicial procedure help reproduce this cisgender paradigm. The process undermines the epistemic capacities of transgender people as knowers in their own right. Since (cis)gender(ed) knowledges are already pre-fashioned constructions – i.e., legal precedent – transgender people enter into the field of liberal legal discourse at a disadvantage. Are there risks of colonizing transgender experiences with a cishnormative, or cisgender-privileged, standard of being? As Finn Enke (2013) notes, “the concept of cisgender privilege provides a necessary critique of structural hierarchies built around binary sex/gender....When cis is taken up as an admission of privileged identity, it is cis-privilege itself that reifies trans as most oppressed – so oppressed, in fact, that it cannot speak out of character” (p. 240). Accordingly, the courts construct out of the cisgender body the caricature of the transgender body, and thus discipline transgender narratives within legal discourse to meet corresponding cisgender narratives of discrimination.

However, as Kylar Broadus (2006) observes, the law has a “tremendous power to reflect and shape larger societal messages of acceptance or rejection” (p. 99). In this way, courts are not only symbolic. They are both repositories and agents of knowledge. They transcribe the process of how human subjects become legal subjects, how human claims are understood before the law, and how social categories (race, sex, gender,

age, ability, etc.) are to be understood within a given constellation of rights and statutes. Fricker's (2007) analysis is a method for not only examining the shortcomings of legal institutions. It invites alternatives to how they might be reimagined to include the possibility for epistemic justice in law. Thus, in light of victories for transgender people in the realm of employment discrimination, how might "transgender" escape from the capture of the cisgender experience that seem to narrate and make it legible?

Miranda Fricker's "Epistemic Injustice"

Epistemic injustice takes two distinct forms. Its first is *testimonial*, and relates directly the utterances (or testimony) of a speaker/knower. José Medina (2013) explains these forms of injustices as they stem from identity prejudices. In short, we as hearers of communicated information are in many ways biased by certain preconceived notions about the speakers with whom we engage. We inherit and develop these prejudices from the social conditioning that constitutes our experiences and developing identities (Fricker, 2007, pp. 86-87). As Medina (2013) explains, "in testimonial exchanges, hearers who give less credibility than deserved to speakers commit an epistemic injustice, and a systematic one if their unfair credibility assessments are motivated (or simply mediated) by identity prejudices that amount to structural biases against members of certain groups" (p. 54). In courts, the marginalized speaker or litigant faces the preconceived notions of gender of the judges. They must also run their claims against the precedent that has already disclosed how gender will be adjudicated. For instance, in his analysis of human rights law, William Simmons (2011) asserts the marginalized "victim's narrative will not be heard as it will be in an idiom that does not register with the hierarchy [of law]. Indeed, the testimony of the Other is always put on trial to determine legitimacy" (p. 134).

Another form of epistemic injustice is an interpretive impediment to our social practices, or *hermeneutical injustice* (Fricker, 2007, p. 147). This injustice exists within the very structure of how social knowledge is produced, or shaped, by active knowers and contributors. To investigate these kinds of injustices is to ask *who* is contributing to the overall scope of

social knowledge production as well as *who* has access to that social knowledge at all. Hermeneutical injustice also involves the interpretive capacities of the knower and her relation to the collective body of social knowledge used to help make her experiences legible. Interpretive capacities of a knower relate specifically to her ability to understand herself in various social contexts – as experiencing and feeling wrongs or rights, misdeeds, affection, compassion, pain, anguish, etc. But in order for her to label these rights or wrongs, or to understand the experiences she has undergone, she must have the conceptual vocabulary to make sense of her experience. If there is no grammar or vocabulary making sense of an experience, it is “inevitably hard to detect” because this marginalization is a product of structural social conditions (Fricker, 2007, p. 152). Thus, if a knower does not have the grammar, or a vested vocabulary to interpret wrongs effectively, from an epistemic point of view she faces an injustice. This is true not only because she cannot fully comprehend what exactly is happening to her and thus makes her claim to discrimination or wrong illegible. She has no recourse to contribute a corrective to it within the larger body of knowledge about that wrong. Fricker (2007) examines these injustices in contexts ranging from post-partum depression to sexual harassment, and marital rape. All of these exhibit apparent wrongs associated with them – assuming hysteria in women after birth, allowing sexual harassment as a norm, or the act of rape itself (pp. 148-49). However, from the point of view of epistemic injustice, it is also *unjust* that a person is prevented from engaging in a sustained understanding that her lived experiences persist under domination – that her knowledge is illegible and unintelligible from the outset. Indeed, “the background condition for hermeneutical injustice is the subject’s hermeneutical marginalization” (ibid., p. 159). This article extends the conception of hermeneutical injustice to transgender experiences and knowledges as they are re-lived and re-situated in legal discourses. In a time where the spotlight on transgender people is at an all time high, narratives of transgender communities and the knowledges they produce become crucial to creating more just institutions.

Transgender Knowledges

It is an analysis of hermeneutical injustice that is central to this article's argument. Defining "transgender" and "transgender experiences" are not easy tasks, and this article does not seek to limit the possibilities of either. The "everyday" and the "lived experience" now figure prominently in feminist philosophy, particularly in feminist epistemologies (Alcoff & Potter, 1993, p. 4). They are key sites for opening up the possibility of theorizing the reality and plurality of gendered life. The present argument builds on the suggestion that the everyday is absent from legal discourse on the subject of being transgender and that this absence, or lacuna, is the condition of epistemic injustice.

How social actors perceive transgender experiences is carved out of shared cultural norms. Such norms inhibit not only shared conceptions of what constitutes "normal" gender appearances and experiences. They inscribe themselves on transgender communities' sense of selfhood. Joanne Meyerowitz (2002) argues, "(t)oday as in the past (...) transsexuals often appear as symbols of something larger than their own everyday selves" (p. 11). She argues that the transsexual takes on various mediated representations, from the "autonomous individual" to the re-inscriber of "the conservative stereotypes of male and female and masculine and feminine" (ibid.). She rejects these tropes. Rather, Meyerowitz (2002) recounts a history of a "diverse groups of people" not reducible to a single set of experiences. At bottom, the historical goals of transgender people in Meyerowitz's work were to discover and thereby express their selfhood. Yet they did so with the "language and cultural forms available to them" (ibid.). The period that Meyerowitz studies (mid-20th century America) had medical and legal discourses intertwined. One reading suggests that this fusion often eclipsed the voices and agency of transgender women who sought surgeries. Yet, these women learned the "medical script" in order to seek out their body's alterations (ibid., p. 145). Meyerowitz's groundbreaking history recounts transgender agency. Transgender people made due with the cultural forms and language as *they understood* them. However, this specific language and the cultural forms attached to it have changed.

Outside medical and legal forums, transgender “social transitions” take on multiple contexts with interconnected depths: from pronoun choices, name selections, physical appearances, the physical manifestation of “voice,” clothing, hair, makeup, non-medical body modification such as breast-binding, “standing-to-pee” devices, penis-tucking, and hair removal (Reynolds & Goldstein, 2014, pp. 124-136). “Being read correctly,” or “going stealth” becomes personal acts of survival – and in this sense political acts against social policing. Given this (non-exhaustive range) of activities, a single narrative, an unfortunate linguistic slip that describes the “transgender experience” in the singular or a “transness” as essence, commits an epistemic wrong, an injustice, to the representative voice of these political communities. More to the point, “Mainstream cultural beliefs about ‘transness’ are so far off the mark that some of us want to be out and visible everywhere we go, to put a face on what ‘trans does and does not mean’” (ibid., p. 144). Archiving transgender experiences reveals the historical depths of these varied experiences.

The Transgender Archive at the University of Victoria, BC, becomes a point of departure where history and present narratives meet. This article, therefore, recounts a few of the many stories from the archive. This constellation of experiences provides a (if somewhat partial) glimpse the varied socially-situated knowledge(s) of transgender people.

In her story, “Died and Gone to Heaven,” Jane Nance writes about the possibilities and non-possibilities of living life as a woman “full time.” Going to lunches, shopping, appearing and acting – these are “fantasies,” the idealizations that she cannot hope to attain. She goes on vacation with her wife as a full-time woman, “two gals” out on the road. She wants her “mind and body” to feel in “congruity as one!” (Nance, Undated, Died and Gone to Heaven, pp. 2, 23). She revels in the experiences she shares with her wife as a woman. She speaks often of a body conditioned by the social realities of being male, but of possessing a female mind – of a split. Nance longs for recognition as a woman, of *being* a woman as well as being recognized in her identity as a transsexual (ibid., p. 2).

In 1969, Virginia Prince (1969), a pioneer of the “transgenderist” movement, argued “(m)ost women have little

to say about the fact of their woman-hood...I was born a male and raised as a boy and grew to be a man. Today I live as a woman by choice” (p. 1). But she “hastens” to add that she is not a transsexual, that she is “still a perfectly normal male and [she] plan[s] to stay that way” (ibid.). (Cisgender) women have never had to question their bodies as such, in Prince’s view. However, transgender people’s identities are nevertheless irrevocably grounded in embodied norms. Speaking about cultural norms and their pervasiveness in this regard, she adds:

A man is limited severely, however, in the degree to which he can move away from the accepted patterns and requirements of masculinity and toward the more permissive world of femininity...I am a woman by choice. (Ibid.)

Most of Prince’s publications (including *The Transvestite and His Wife* and the magazine *Transvestia*) – focused on defining, however narrowly, differences among and within transgenderist communities – are meant to spread information and thus create a language, a sub-cultural grammar and vocabulary of transgender being, a grammar that is often missed in contemporary legal discourse.

In a letter known only as “The Quest,” the writer remarks that she always knew and continues to understand her “body” as male, but that she identifies as female (The Quest, undated). Under the pressures of ensuring, she stayed employed and she wore men’s attire. When eventually discovered wearing women’s attire, she was labeled a cross-dresser. She herself identifies as a transsexual. In her letter, she describes how she is taking hormones, recounts her desire to undergo sex reassignment surgery, and speaks of the strong urge to have a body that looks like the image she has inscribed in her mind. The author narrates having the fear of being “found out,” of reading what happens when others like her are discovered – of the violence visited on their bodies.

Skye, the author of an undated letter entitled “Paths to Understanding,” suggests only that her appearance will change after transition? She writes for recognition that her “self” be defined by personality – that perception be based on more than

just her desired transition (from male to female). But her fear, just like the unknown author of “The Quest,” is that of being discovered – of effeminacy that is mapped onto her “wrong” male body and thus the “wrong” attire she might be discovered wearing:

So, with all this knowledge, how do I feel? I still become depressed. I still am in a recluse phase. I continue with my sporadic ingestion of estrogen. I still long to be rid of my maleness and want to be in my femaleness....Then I think about my deep voice, my veiny hands, my high forehead, and I am caught in the middle of conflict. I stop taking the estrogen. Nothing is possible. Then I start again. (Skye, *Paths to Understanding*, undated)

Transgender experiences are those of self-creation in a cultural milieu inimical to the idea of gender fluidity; these experiences push boundaries and norms while simultaneously adopting some. Yet for all this gendered and sexed diversity, US-American culture and particularly its legal discourses are fastidiously attached to cisgender narratives of a gender/sex binary that fixes male and female expressions of selfhood.

Courts as Venues of Epistemic Injustice

How do courts play their part in the perpetuation of epistemic injustices even when they make decisions that favor transgender communities? Courts construct the legal subject on the basis of what is at hand – i.e., precedent, court briefs, a judge’s own personal knowledge and experience of a thing. The most durable legal construction of the gendered subject is carried out through the gender binary – of the man/woman distinction. My argument hinges on certain critical observations of cisgendered legal cognition that underlies judicial precedent. Based upon the precedent set in the Supreme Court case, *Price Waterhouse v. Hopkins* (1989), the legal category of gender/sex has remained relatively fixed. What follows in this section will be an analysis of several cases dealing with transgender workers who experienced employment discrimination. These cases include *Smith v. City of Salem* (2004), *Schroer v.*

Billington (2007), *Glenn v. Brumby* (2011), and *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* (2015) – each conditioning the legal subjectivity of the transgender person in hermeneutically unjust ways by foreclosing transgender experiences and narratives of discrimination from entering the legal field. Each inevitably fold together the testimonial and hermeneutical forms of injustice (Fricker, 2007, p. 159). In a later section, I will examine two points of departure from these systemic ways of reading transgender narratives through an analysis of *Enriquez v. West Jersey Health Systems* (2001) and *Finkle v. Howard County, Md.* (2014), both of which help expand the status of *transgender* in the legal discourse on discrimination.

Sex discrimination cases refer, inevitably, to the precedent set in *Price Waterhouse v. Hopkins* (1989). In *Price*, the U.S. Supreme Court ruled that private employers could be held liable for “sex stereotyping” when they engage in open practices of discrimination based on certain preconceived notions of gender. At issue was a cisgender female employee of Price Waterhouse, Anne Hopkins, who was denied partnership at the firm. In filing her claim against the firm, Anne Hopkins asked the Court to consider the disparaging remarks male partners had made during the process of considering her partnership. She was held to lack the necessary aggression, the “macho” qualities that *being* a “woman” naturally foreclosed. Price Waterhouse argued that such statements were not in violation of Title VII of the 1964 Civil Rights Act because they were not made in direct consideration of sex, *per se*. In disposing the case, the majority discussion held much of gender/sex as one and the same thing. Sex, for this court, became the site on which gender is mapped. A masculine woman or a feminine man cannot be, in this sense, discriminated against as such discrimination constituted an “impermissibly *cabined view* of the proper behavior of women [or men]...” (*Price Waterhouse v. Hopkins*, 1989, at 237, emphasis added). The majority goes on to reason that:

In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision

what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman. In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of sex stereotyping. (*Price Waterhouse v. Hopkins*, 1989, at 237)

In terms of precedent, the *Price* decision set the following foundation: The body is either male or female, man or woman, masculine or feminine, and judgments are anchored by these cisgender conceptions of sex, gender identity, and general bodily expression.

The courts rely on analogical reasoning to conclude that a given litigant has experienced discrimination. This sort of cognition suggests that a person's experiences of discrimination can be mapped onto another case containing "similarities". This reasoning situates transgender discrimination squarely alongside cisgender forms of sex stereotyping. In *Smith v. City of Salem* (2004), the circuit court ruled "(a)s such, discrimination against a plaintiff who is a transsexual – and therefore fails to act and/or identify with his or her gender – is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman" (at 574-75). The question remains: According to which standard of woman did she fail to act, and on whose terms? Although the court seemed to suggest a more expansive view of "sex stereotyping" was on the horizon, the court places the "behaviors" and "appearances" of a transgender woman alongside the characteristics of other cisgender plaintiffs.

In *Schroer v. Billington* (2007), the court suggested that an analogy be drawn between an employer's decision to discriminate against a person's decision to transition genders and a person's decision to convert religions. The majority concludes that "(n)o court would take seriously the notion that 'converts' are not converted by [Title VII]. Discrimination because of religion easily encompasses discrimination because of a change of religions. But in cases where the plaintiff has

changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute....” (Ibid., at 31). The court would rule in favor of the transgender litigant. Yet, the analogy whereby religions stand in for gender would seem to suggest that transgender people are to be taken as “converts,” in the process of moving between one legible form of being to another.

The equivalence of “convert” to “transgender” is misleading, as much as the proclamation that a transgender person experiences “the same” kind of discrimination under employment law as cisgender people would. It suggests a kind of liminality, an in-between space for the transgender litigant. Outside of an accepted gender duality, transgender people are not, in one fundamental legal sense, a categorically distinct identity possessed of separate experiences. In other words, “transgender” is merely the means through which a court might seek to understand the much more legible experiences of (cisgender) man or woman. The cognitive movement between two gender poles constructs an isomorphic transgender subject out of pre-fashioned pieces. Caught between these categories that are based on cisgender experiences of gender, transgender narratives *as transgender* are radically altered or hidden from view. Indeed, the *Schroer* court would explicitly rule that “transsexuality,” in itself, has yet to be categorically protected.

These sorts of judicial epistemic commitments are typical of cisgenderism, which describes the “cultural and systemic ideology that denies, denigrates, or pathologizes self-identified gender identities that do not align with assigned gender at birth as well as resulting behavior, expression, and community. This ideology endorses and perpetuates the belief that cisgender identities and expression are to be valued more than transgender identities and expression and creates an inherent system of associated power and privilege” (Lennon & Mistler, 2014 p. 63). Through their institutional power, as (knowing or unknowing) arbiters of cisgenderism, courts create the conditions for hermeneutical injustice. This view is illustrated by jurisprudence finding that gender and sex stereotypes themselves constitute discrimination because they unjustly establish what it *means* to be a man or woman (see

above, *Price v. Waterhouse* 1989). However, from this point of view, what standard of man or woman is being enacted, and whose bodies are being posited as reflective of these standards? This legal cognition does not seek to arrive at any meaningful transgender experience of womanhood or manhood. It takes for granted that cisgender experiences of womanhood and manhood (in other words, gendered selfhood) constitute sex stereotypes. This form of reasoning is itself epistemically problematic because it denies the legibility of transgender experiences of gender and sex as such. It also forecloses the entrance of such knowledges into the range of experiences that populate the resources of knowledge that constitute legal as well as social discourse. It is not enough, I argue, that a transgender person has, by law and right, protections against discrimination or harassment.

One of the most well known cases in transgender employment in recent years illustrates the limits of such kind of legal discourse to take transgender experiences and difference seriously. The case, *Glenn v. Brumby* (2011) does refer to Vandy Beth Glenn as a transgender woman. It offers the impression that that category itself enters the discursive array of the court's reasoning. Yet, a closer look suggests that cisgenderism organizes the court's legal cognition.

In October of 2007, Vandy Beth Glenn, a former naval officer and journalism alum of the University of Georgia, announced to her employers that she intended to live her life as a woman – confirming publicly a personal truth that had remained mostly private. She was transgender. Having been diagnosed with Gender Identity Disorder (GID), Glenn's lawyers would later explain that she struggled with her social status as 'male' – the sex assigned to her at birth. At the time, the DSM-IV described Gender Identity Disorder as a 'serious condition' or pathology, in which a person whose gender identity did not conform to their birth-assigned sex (this has changed, as the current edition of the DSM-V [American Psychiatric Association, 2013] now describes such a "condition" as Gender Dysphoria, not "disorder"). Her public decision came as a relief. Glenn loved her job. She had been working at the General Assembly's Office of Legislative

Counsel of Georgia as an editor and proofreader for the previous two years.

Glenn informed her immediate supervisor, Beth Yinger, of her intention to transition and Yinger passed along the information to the head of the Legislative Counsel, Sewell Brumby. Sewell would later confront Glenn about her transition-related decision, telling her it was “inappropriate,” firing her as a result. Glenn filed suit against Brumby in 2008. The claim was legally straightforward: Glenn’s firing was a clear violation of the Equal Protections clause of the 14th Amendment of the US Constitution as it related to sex stereotyping. Sex for the Eleventh Circuit court was still considered biological, or birth-assigned. Gender was a separate, socially constituted identity. However, the Eleventh Circuit held that Glenn’s decision to transition was not only considered sex-related. It also touched on areas of gender. Glenn’s assigned sex at birth notwithstanding, her decision to move forward with both physiological and dress-related transitions fell under the court’s wider interpretation of *Price*. In 2011, after three years of judicial procedure and hearings, Glenn finally won her job back.

In order to determine whether Glenn suffered a violation of sex discrimination under the Equal Protection Clause of the 14th Amendment, the Eleventh Circuit had to come to terms with the definition of transgender as a legal category. The court moved toward a definition of transgender as that of action and perception. “A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes” (*Glenn v. Brumby* 2011, at 1317). For this determination, the court used a law review’s determination that the “very acts that define transgender people as transgender are those that contradict stereotypes of gender appropriate appearance and behavior” (Turner, 2007, p. 563). The court went on to conclude that there is “a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms” (ibid.). Discrimination against transgender employees presumes discrimination on the basis of gender norms. The transgender person “transgresses” or “violates” these norms or stereotypes. However, these

conclusions are reached through the lens of the very norms found stereotypical. In other words, the experiences of transgender persons, in order to be understood as transgender, hinges on the conclusion that transgender legibility is maintained between two legible cisgender markers.

Much of the *Glenn* decision does not deal with transgender experiences. Rather, “transgender” is perceived through the precedent that has already made sense of gender stereotypes. The court held that “An individual cannot be punished because of his or her perceived gender-nonconformity” (*Glenn v. Brumby* 2011, at 1319). How is gender nonconformity being perceived, however? Previous cases were primarily dealing with cisgender men wearing jewelry, or cisgender women entering workplaces in pants, or other “typically” masculine attire, or clothing associated with military service and thus being considered too “butch.” “Sex stereotyping,” as a heuristic, smuggles the cisgender body and the gender norms that map onto it as foundational. Transgender experiences of discrimination are made legible through this foundation. In one sweeping statement, the court erases the particular difficulties that transgender employees face in their lived experiences as being transgender: “Because these protections are afforded to everyone, they cannot be denied to a transgender individual. The nature of the discrimination is the same; it may differ in degree but not in kind” (*Glenn v. Brumby* 2011, at 1319). Such is the nature of equality guarantees. Because “everyone” is afforded protection – indeed a cisgender “everyone” – transgender individuals cannot be denied that protection. Symbolically powerful, but this does not offer epistemic credit to the particulars of transgender discrimination. Indeed, the fact of being transgender – of not only looking and acting “differently” but of actually inhabiting embodied difference – invites social violence and discrimination in various forms that are not taken into account in the *Glenn* case decision.

These cisgender conceptions of gender/sex undergird even the most recent rulings. Regarding a transgender employee’s termination, the court held:

[I]f the EEOC's complaint had alleged that the Funeral Home fired Stephens based solely upon Stephens's *status as a transgender person*, then this Court would agree with the Funeral Home that the EEOC's complaint fails to state a claim under Title VII. (*EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 2015, at 2, emphasis added)

The status of being transgender is not in itself the site of discriminatory action. The court holds to this reasoning because “the EEOC's complaint also asserts that the Funeral Home fired Stephens ‘because Stephens did not conform to the [Funeral Home's] sex- or gender-based preferences, expectations, or stereotypes’ [(Compl. at ¶ 15)]. And binding Sixth Circuit precedent establishes that any person *without regard* to labels such as transgender can assert a sex-stereotyping and gender-discrimination claim under Title VII, under a [Price Waterhouse] theory, if that person's failure to conform to sex stereotypes was the driving force behind the termination” (ibid., emphasis added). Under this brand of reasoning, the legal heuristic of “sex stereotyping” does not have to depend upon the claimant’s social identity. In this sense, it is not the transgender person who holds the discursive and epistemic keys to unlocking why their discrimination is patently unjust. It is, rather, sex stereotyping from the perspective of cisgender sex stereotypes that constitutes the wrong, which can be described as a hermeneutic injustice. This lack of a conceptual vocabulary allowing transgender experiences to become legible *as* transgender creates the demand for a shift in hermeneutical resources for courts of law.

Thus the transgender legal subject undergoes a radical mediation. Glenn’s status as transgender is liminal: her experiences are seen in terms of either cisgender male or female forms of stereotypes, not transgender experiences of these identities. The social qualities of this transgender experience(s) are erased because “everyone” deserves the right to equal protection. Moreover, this invites the question of what type of transgender person is taken for granted. Where, in such a schema, do non-binary people, or those who reject the binary altogether, or “gender bend” – by subverting gender

expressions one day but not the next – or who are intersex, belong? Where does race belong in these intersecting phenomena?³ Dramatically, transgender experiences are at risk of altogether disappearing in the face of such reasoning in legal discourse.

Shifting Hermeneutical Resources: Toward Understanding *Transgender* Discrimination in Law

For epistemic justice to exist at all, there can be no primarily “authentic” voice, no idealized individual subject. Rather, the composite of voices and experiences that make up an identity should be taken into account. The movement toward epistemic justice has been illustrated in recent years by numerous agency decrees. The EEOC for the US government has insisted in a number of cases that transgender people are protected under federal statutes (particularly Title VII of the U.S. Civil Rights Act of 1964) and other precedents. Indeed, the protections against “sex discrimination” act as the bulwark against discrimination of transgender employees. Indeed, from the universal legal point of view, gender and sex collapse on this front. The EEOC’s definition of gender identity as one’s “inward sense” of gender that does not match their “birth assigned sex” is not itself problematic. It suggests that a person’s identity of “transgender” strives at creating a “match” between their cognitive gender and their bodily morphologies. It is important to note that public employees are protected under these new rules. Private employees are not. Local and state initiatives to protect transgender people vary. The EEOC and others have come to terms with transgender claimants and the fact of their discrimination in the workplace, albeit a governmental workplace. Case law brought this American executive agency and legal system to a point of understanding “transgender.” Notwithstanding, the epistemic implications put recent “progressive” views on gender and sex to the test.

Some legal venues have adopted alternative approaches that expand beyond the univocal transgender narrative, creating a kind of legal “epistemic friction” against the cisgenderism of precedent laws (Medina, 2013, pp. 48-55). For instance, in 2001, a New Jersey court moved beyond sex stereotyping, holding that a “person who is discriminated against because he

changes his gender from male to female is being discriminated against because he or she is a member of a very small minority whose condition remains *incomprehensible to most individuals*. The view of sex discrimination reflected in [precedent case decisions] is too constricted” (*Enriquez v. West Jersey Health Systems* 2001, at 372). The court explicitly regards the status of transgender as a category of identity, holding that the statute in question determines that “[d]istinctions must be made on the basis of merit, rather than skin color, age, sex or gender, or any other measure that obscures a *person’s individual humanity and worth*. This case represents another step toward achieving what has thus far been an elusive goal” (*ibid.*, emphasis added). The case further suggests not only the court system’s own epistemic limits (through its denial that precedent law has taken up the transgender identities adequately) but also that society has yet to comprehend “transgender” in its fullness.

Furthermore, a district court in Maryland, more than a decade later, gestures toward this kind of epistemic comprehension of transgender communities – of taking transgender, in itself, seriously. In *Finkle v. Howard County, Md.* (2014), the court ruled that an employee with an “obvious” status as transgender is protected under “sex stereotyping” claims. The Plaintiff, Finkle, argued that her appearance as a broad-shouldered, masculine-looking woman constituted, as appearances go, the reason for her discrimination. The victory itself cautions pause. A more expansive view of “sex stereotyping” should include the identity of transgender. But a court’s incorporating this identity can only have epistemic merit when it concedes that transgender people have particular forms of discrimination such as Finkle’s, where it is situated in a world outside legal discourse. “The obviousness” of Finkle’s discrimination is founded in the fact that in a reality composed of degrees of cisgenderism, transgender people become the site of difference and derision (*ibid.*, at 13). For the court, acknowledging this site of difference is key to developing good law engaging and dismantling the varieties of discrimination that transgender people face.

Conclusion

“Sex stereotyping,” as a legal heuristic, naturalizes cisgender conceptions of gender/sex. How can legal discourse take differences seriously – where the body is the site of the difference? In his analysis of gender construction before the law, Paisley Currah (2009) finds that most winning arguments follow the standard pursued in the *Glenn* court. Others have followed similar arguments, both critical yet receptive to the power of the symbolic victories these cases carry (Gordon, 2009). Yet, the internal power of this judicial reasoning to construct a gendered subject routinely relies on cisgenderism as it organizes the legal imaginary of sex/gender. The anchor is always already a pre-fashioned cisgender body. What can the courts do to comprehend the multiplicities of being transgender, or the experiences that it entails? There must be a sustained epistemic commitment to have transgender discourses and narratives of gendered selfhood enter into these various frames of reference in order for legal institutions to realize epistemic justice.

Dean Spade’s (2011) work engages in a sustained critique of this sort of cisgenderism in the law. His perspective on rights, specifically those developed under discrimination law, is founded on what he perceives as the “perpetrator/victim dyad, imagining that the fundamental scene [of discrimination] is that of a perpetrator who irrationally hates people on the basis of their race and fires or denies service to or beats and kills the victim based on that hatred” (p. 84). The law, for Spade, adopts an already ideological notion rooted in systemic oppression – and thus becomes a difficult site in which to tackle that oppression. Rather, it reproduces oppression (ibid.). Transphobia and cisgenderism are linked. Once viewed as the foundational body and the accepted norm of bodily appearance and expression, “cisgender” helps to enact social and political violence on non-normative bodies – hence the phobia that increases violence against trans people (Enke, 2013). The movement toward legal equality, from Spade’s point of view, misses that point altogether. In order to seek full protections for transgender people, the law must reflect the full diversity of transgender life as it is lived – not as it is idealized within

liberal traditions that extol cisgender bodies as the starting point of sexed and gendered subjectivity.

As Bassichis, et al. (2013) argue, a radical strategy and critique “is...recognizing that alternative approaches to the ‘official’ solutions are alive, are politically viable, and are being pursued by activists and organizations around the United States and beyond” (p. 654). Offering “transformative approaches” to big problems that otherwise official, or mainstream, approaches have already attempted, Bassichis, et al. (2013) advocate for community interrelations to organize around and outside of legal strategies. The authors argue in favor of “build[ing] community relationships and infrastructure to support the healing and transformation of people who have been impacted by interpersonal and intergenerational violence” (p. 655). In this sense, creating discursive spaces that open up hermeneutical possibilities for courts to grasp are the conditions for the possibility of creating a legal grammar attentive to transgender diversity. Levi & Klein (2006) have argued that intersecting disability law with transgender discrimination jurisprudence would “transform the colloquial understanding of disability” and expand protections for transgender people while dismantling misconceptions of disability (p. 83). Indeed, “Disability antidiscrimination laws cover both those who experience some limitations because of a health condition, as well as those who experience discrimination solely because of *ignorance, stereotypes, and misperceptions* about their health conditions” (ibid., p. 75, emphasis added). Multiplying out the number of intersecting legal protections is generative, for Levi & Klein (2006). Disability and transgender should not be taken as synonymous, but productively useful ways of thinking through allying otherwise disparate legal discourses. Most scholars agree on this point: there is a plurality of unconventional and radical approaches, from community institution building to intersectional legal claims, that should motivate interactions with legal institutions for a “more humanistic movement” (Minter, 2006, p. 159).

Including these departures would be the constituent features of epistemic *justice* in legal institutions and discourses. Through these inclusions, transgender narratives would enter

into the pool of shared knowledge that forms the foundation of our legal vocabularies concerning marginalization. Indeed, it would help engender a field of judicial grammar that is epistemically inclusive. It would involve the active engagement of justices and judges to exercise a certain “reflexive awareness” of the struggle that transgender people face in making their lives legible. It would therefore expand beyond the limited scope of a “protected category” or the use of heuristics such as “sex stereotyping.” Rather, acute attention would be paid to the discursive and material practices that make up transgender experiences of discrimination. In this way, the process of judicial reasoning must intertwine with the process of life itself. A commitment to the everyday should assume that our legal institutions reflect our collective life adequately, grasping at the roots of lived and situated moments in order to understand the varied people that make up transgender experiences. As gender and sex are integral parts of the lived experiences of humans, the institutions that we, at least in theory, consent to govern us must unequivocally *understand* gender and sex as they are lived in a world of bodily plurality.

That we are social creatures is a theoretical commonplace: “human nature only really exists in an achieved community of minds” (Hegel, 1977, p. 43). But achieving that community, or communities, requires new commitments to epistemic virtues in philosophy and political life. Fricker (2007) agrees, arguing “The only way to fully understand the normative demands made on us in epistemic life is by changing the philosophical gaze so that we see through the negative space that is epistemic injustice” (p. 177). It is a demand to realize the material force and social location of knowledge in all its diversity and to reflect that knowledge back into our governing institutions.

Notes

¹ This article uses transgender in the sense borrowed from Susan Stryker's (2008) and Paisley Currah's (2006) pluralistic conception of it. The word itself refers to a person's identity who "moves away" from the sex they were assigned at birth. It may also refer to anyone who defies or transgresses the gender norms that are socially constructed. Some legal cases and authors in this article have used the term "transsexual" to describe an individual who has undergone some form of sexual reassignment surgery (see Meyerowitz 2002). Throughout this article I try to consistently use transgender and qualify its gendered and sexed implications.

² I use "gender/sex" to indicate the co-extensive relationship between these two terms.

³ Rachel Walker's (2011) discussion of New York City's Christopher Street Pier kids, an ethnographic account of the lives of mostly homeless transgender and queer youth living near the Greenwich Village neighborhood in New York City, illustrates the tragic paucity of knowledge about the conditions in which most transgender and queer people of color experience violence. Walker's survey of the various transgender and queer identities that thrive on the Christopher Street Piers also highlights the harsh realities of economic marginalization, social violence, and brutal policing of non-normative bodies of color.

References

- Alcoff, L. & Potter, E. (1993). Introduction: When feminisms intersect epistemology. In L. Alcoff & E. Potter (Eds.), *Feminist epistemology* (pp. 1-14). New York: Routledge.
- American Psychiatric Association. (2013). *Diagnostic and statistical manual of mental disorders* (5th ed.). Arlington, VA: American Psychiatric Publishing.
- Aultman, B. L. (2014). Cisgender. *TSQ: Transgender Studies Quarterly*, 1(1-2), 61-62.
- Bassichis, M., Alexander L., & Spade, D. (2013). Building an abolitionist trans and queer movement with everything we've got. In S. Stryker & A. Aizura, *The transgender studies reader 2* (pp. 653-667). New York: Routledge.
- Broadus, K. W. (2006). The evolution of employment discrimination protections for transgender people." In P. Currah, R. M. Juong, & S. P. Minter (Eds.), *Transgender rights* (pp. 93-101). Minneapolis: University of Minnesota Press.
- Currah, P. (2006). Gender pluralisms under the transgender umbrella. In P. Currah, R. M. Juong, & S. P. Minter, (Eds). *Transgender rights* (pp. 3-31). Minneapolis: University of Minnesota Press.
- Currah, P. (2009). The transgender rights imaginary. In M. A. Fineman, J. E. Jackson & A. P. Romero (Eds.), *Feminist and queer legal theory* (pp. 245-258). Surrey, UK: Ashgate.
- EEOC v. R.G. & G.R (2015). Harris Funeral Homes, Inc. ____ F. Supp. 3d ____, 2015 WL 1808308 (E.D. Mich. Apr. 21, 2015).
- Enke, A. F. (2013). The education of little cis: Cisgender and the discipline of opposing bodies. In S. Stryker & A. Aizura, (Eds.), *The transgender studies reader 2* (pp. 234-247). New York: Routledge.
- Enriquez v. West Jersey Health Systems, 777 A.2d 365 (N.J. Super. Ct. App. Div. 2001).

- Finkle v. Howard Cnty., Md. 122 Fair Empl. Prac. Cas. (BNA) 861, 2014 WL 1396386 (D. Md. Apr. 10, 2014).
- Fricker, M. (2007). *Epistemic injustice: Power and the ethics of knowing*. New York: Oxford.
- Glenn v. Brumby. 663 F.3d 1312. (2011).
- Gordon, D. R. (2009). Transgender legal advocacy: What do feminist legal theories have to offer? *California Law Review*, 97, 1719-1762.
- Hegel, G. F. (1977). *The phenomenology of spirit*. A. V. Miller (trans.). New York: Oxford University Press.
- Lennon, E. & Mistler, B. J. (2014). Cisgenderism. *TSQ: Transgender Studies Quarterly*, 1(1-2), 63-64.
- Levi, J. L. & Klein, B. H. (2006). Pursuing protection for transgender people through disability laws. In P. Currah, R. M. Juong, & S. P. Minter (Eds.), *Transgender rights* (pp. 74-92). Minneapolis: University of Minnesota Press.
- Medina, José. (2013). *The epistemology of resistance: Gender and racial oppression, epistemic injustice, and resistant imaginations*. New York: Oxford.
- Meyerowitz, J. (2002). *How sex changed: A history of sexuality in the United States*. Cambridge, MA: Harvard University Press.
- Minter, S. P. (2006). Do transsexuals dream of gay rights? Getting real about transgender inclusion. In P. Currah, R. M. Juong, & S. P. Minter (Eds.), *Transgender rights* (pp. 141-170). Minneapolis: University of Minnesota Press.
- Nance, J. Undated. [Story: Died and gone to heaven]. Rikki Swin Collections, the transgender archives at the university of Victoria (Box 4), the university of Victoria, Victoria, British Columbia.
- Nelson, L. H. (1993). Epistemological communities. In L. Alcoff & E. Potter (Eds.), *Feminist epistemologies* (pp. 121-159). New York: Routledge.
- Price Waterhouse v. Hopkins. 490 U.S. 228. (1989).

- Prince, V. (1969). ["Men who choose to be women"]. Rikki Swin Collections, The Transgender Archives, (Box 4), University of Victoria, Victoria, British Columbia.
- Reynolds, H. M. & Goldstein, Z. G. (2014). Social Transition. In L. Erickson-Schroth (Ed.) *Trans bodies, trans selves: A resource for the transgender community* (pp. 124-154). New York: Oxford University Press.
- Schroer v. Billington. U.S. Dist. Lexis 89885. (2007).
- Simmons, W. P. (2011). *Human rights law and the marginalized other*. New York: Cambridge University Press.
- Skye. Undated. [Paths to understanding]. Rikki Swin Collections, the transgender archives at the university of Victoria (Box 4), the university of Victoria, Victoria, British Columbia.
- Smith v. City of Salem, 378 F.3d 566, 574-75 (6th Cir. 2004).
- Spade, D. (2011). *Normal life: Administrative violence, critical trans politics and the limits of law*. New York: South End Press.
- Stryker, S. (2008). *Transgender history*. New York: SEAL Press.
- [The quest]. Undated. Rikki Swin Collections, The Transgender Archives, (Box 4), University of Victoria, Victoria, British Columbia.
- Turner, I. M. (2007). Sex stereotyping per se: Transgender employees and title VII. *California Law Review*, 95, 561-596.
- Walker, R. L. (2011). "Toward a FIERCE! Nomadology: Contesting queer geographies on the Christopher street pier." *Phaenex*, 6(1), 90-120.