Semantic Closures and the Law: The Epistemic Injustice(s) of Constructing Transgender Legal Subjects

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**Abstract**:

There exists a disjunction between the lived experiences of transgender[[1]](#footnote-1) people and the legal claims they make within the American judicial system. This disjunction, I argue, creates the conditions for epistemic injustice. Broadly defined, epistemic injustice occurs when a person’s capacity as a knower is either diminished or removed. What I will be calling the semantic universe of law constructs a particular translation of human life, and is often held as a source of future interpretive legal modeling. It thus fixes trans *being*, establishing a this-ness in transgender,in ways for further juridical claims to be made. The critical point of departure of this work is to provide a critique of how enactments of epistemic injustice, and in that sense violence, are *results of* judicial rule making—even if those results are ‘victories’ for the harmed transgender claimant.

**Introduction: Trans, Instruments of Translation, and Epistemic Justice**

Representation is at the heart of how epistemic justice operates (Fricker 2007; see also Alcoff and Potter 1993 for their discussion on subjectivity). In a closed system such as the law, and in this immediate instance the courtroom, representation constitutes an entire signifying economy that seeks to understand and construct the legal subject as such. It is the praxis of all the human and non-human actors within the legal circuitry. Non-human actors make up a vast array of inscriptive devices that constitute the legal semantic universe—courtroom documents like legal briefs, *amici curiae*, initial filings and complaints, the actual courtroom argument, the procedural aspects of litigation, and precedent. Such a system is forged under the pressures of rationalism and objectivity. Objectivity is a construction in itself, but one that authorizes certain claims over others, connects certain ways of being to legal legibility (see Latour 2010 or Code 1993). These legible constructions, these legal subjects, become the guideposts of judgments in the translation of future legal claims.

Thus far, the most durable construction of the trans subject is seen through the lens of the gender binary—of the man/woman distinction, and the social scripts that attend that distinction. The cases this paper analyses bases their own claims through that dualism, referring to ‘biological sex’ and ‘characteristically male or female’. This is not to say, however, that trans people always live outside of this binary. Many self-identify within the man-woman distinction. However, many do not. Thus, as trans people enter into the field of liberal legal discourse, and liberal subjectivity altogether, how will their lives be adequately, if at all, understood? In that way, this paper examines some of the ways in which gendered knowledges are constructed by judicial institutions and are thus silenced, misrepresented, mistaken, or erased altogether. Its more central question is whether the absence of certain kinds of knowledges produced by certain kinds of groups that carry non-normative gender identities constitutes the basis for what Miranda Fricker (2007) and others have called “epistemic injustice” (see also Medina 2012 for his discussion of epistemic injustice in transnational settings).

In a way, this paper is a continuation, or possibly critique, of a statement made by Professor Paisley Currah. He writes:

I think the solution lies in ensuring that the many, often conflicting, narratives of transgender identity that now appear in social and legal arenas continue to circulate and proliferate. Rather than trying to make sense of all these contradictory accounts of sex, gender, and the relationship between them, rather than trying to develop the 'one perfect theory' to unify them within the context of the larger transgender rights imaginary, we should, as a movement, be celebrating the incoherencies between them even as we continue to pursue rights claims by invoking particularly constructions of gender (2003, 256).

This paper asks, then, how? How, given the epistemological structure of the law that, on the one hand cauterizes, brands, certain differences as otherness and thus illegible (Simmons 2011), can our legal system’s epistemic failures be celebrated? Or, how can we intervene to provide the agonism that is necessary to propagate inconsistency and destabilization that is the ontological framework of queer and trans theorists alike? I believe a look toward epistemic justice might be that path because at its heart, epistemic justice deals with both the material and non-material harms that attend (mis)representation.

As stated, epistemic injustice’s first incarnation is *testimonial*. Testimonial injustice is a form of epistemic injustice in which the literal testimony of a knower of some proposition is disregarded or amplified through recourse to credibility. Failing to recognize, or hold as valid, the knowledge claims of a person is an example of testimonial injustice—what I will also categorize as an epistemic failure. For instance, in his analysis of human rights law, Simmons proclaims that “ The 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” (2011, 134). Epistemic failures also have material consequences; and those material consequences may reproduce the conditions for epistemic failures. As certain testimonies are rendered legible, so too are the legal protections that can ensue. But should testimonies be under constant scrutiny for validity, the systematic oppression of some, what Simmons here calls the Other, will persist. Indeed, Simmons goes on to say that “Spivak shows the utter impossibility of speaking for the subaltern due to the inevitable, un-sheddable position of privilege of the academic, the activist, the attorney, and the judge” (2011, 137). Epistemological frameworks and ontological assumptions, are, in this sense, imbricated in the larger picture of our socio-legal worlds. When someone speaks, especially in the a court of law, their words are under the gaze of credibility—and the law’s difficulty to saturate itself with the narratives of some trans lives render testimonial injustice a real threat to social justice.

Another second of epistemic injustice is insidious, as it stands as an interpretive impediment to our social practices. It works as a gloom between what a subject perceives and what a subject comprehends as lived moments of marginality. That gloom is *hermeneutical injustice*. Another way of understanding this form of epistemic injustice is to think about the interpretive capacities of the knower and her relation with the collected body of social knowledge. Interpretive capacities of a knower relates specifically to her ability to understand herself in a social contexts—as experiencing and feeling wrongs or rights, misdeeds, affection, compassion, pain, anguish, etc. But in order for her to label these rights and wrongs, or to understand the experiences she has undergone, she must have access to a common body of knowledge that I am calling a social knowledge. This social knowledge is not universal. In fact, it is contingent, local—based on the context of communities, and socio-cultural grouping. It can, indeed, constitute the broad concept of a societal knowledge, which takes shape, and in fact can only be intelligible as such, in a cultural epistemological framework (and here I am enlisting Foucault’s concept of the episteme [1994]). It is this invisibility of local knowledge as it is constituted, or rather the praxis of who and whatconstitutes it, which carries the possibility to marginalize and erase certain subjects from the discursive production of knowledge.

Thus, if a knower does not have the resources to interpret those rights and wrongs effectively, from an epistemic point of view she faces an injustice. Not only because she cannot fully comprehend what exactly is happening to her and thus treats a otherwise violation of a norm *as the norm*, but she has no recourse to contribute a corrective to it within the larger body of knowledge about the wrong. Classic examples of this are post-partum depression and the women who came together to collectively discuss their feelings of isolation. Sexual harassment was and is, for the most part, a continued interpretive and material injustice. From an epistemological point of view, it is simply *wrong* that a knower does not understand that the unwanted flirtations or consistently uncomfortably perverse commentary from peers can be challenged as harassment. It is also a material wrong, an injustice that has corrective measures.

In what ways are the courts constitutive actors in the reproduction of epistemic injustices of both the testimonial and hermeneutical sort? I will contend that the courts, given their status as bastions of minority rights, as crucibles of the truth, are repositories for social knowledge. They act as microscopes: amplifying, distorting, or correcting for inconsistencies in order to understand how social life can be constituted in the language of law. As such, they possess the status as bearers of hermeneutical resources—pools of knowledge that enact certain tropes of trans life, while obviating others. This pool reinforces the testimonial injustices of trans litigants whose voices are translated through the various materials of courtroom procedure: documents, briefs, hearings, arguments, files, and so on. In every moment of translation there is mediation. And in every moment of mediation there exists the conditions for epistemic failure.

**I. Legal Reason/Objectivity and the Conditions for Epistemic Injustice**

In its case against a transgender employee, a college argued before the court that “at all times relevant to her [complaint], Plaintiff did not possess the phenotypic characteristics, or internal and external genitalia, of a biological female, that she was designated as a male at birth based upon a genital exam and that prior to her sex reassignment surgery…Plaintiff had normal adult male genitalia, including a penis and testicles” (*Kastl v. Maricopa Community College* 2009, 16). In yet another case, a district court ruled that “such drastic action [here changing one’s sex] cannot be *fairly characterized* as a mere failure to conform to stereotypes” (*Etsitty v. Utah Transit Authority* 2005, 5, emphasis my own). Yet, just 5 years before, in *Smith v. City of Salem* (2004), the court held “that Title VII [of the Civil Rights Act] protected a woman who failed to conform to *social expectations* concerning how a woman should look and behave, [thus] the Supreme Court established that Title VII’s reference to ‘sex’ encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms” (573, emphasis my own).

Words such as ‘social expectation’, ‘sex stereotyping’, ‘characteristics’, ‘possess (in terms of those sexed characteristics)’, ‘biological’, ‘transition’—they stick to the surface of what is legally construed as subjectivity. They are enlisted to understand how a woman, so constructed through biological or social means, has access to, in the immediate instance, Title VII’s prohibition on discrimination. But, these signs stick by virtue of a legal epistemological framework that stresses the urgency of judges to remain objective, rational, and (paradoxically) non-social. Courts are the arenas in which a claim possesses both a semblance social life. But more importantly it establishes a legal life one full of plenary rights. These rights are so defined as protections against private and public injury, statutory or constitutional. Yet, terms as ‘social expectations,’ meant to capture the social world full the abundance and diversity of life (see Connelly 1991), through their inter-textual play of ‘biological sex’ and ‘phenotypic’ characteristics fail to apprehend that life I would caution to ask: in what ways does objectivity actually neutralize the social life of a litigant? Indeed, the cases discussed in this paper virtually strip the trans subject of that social life, a life in which subjectivity (sensations of one’s social self, one’s social location) and identity co-exist. In doing so, they commit epistemic failures owing to an ontological assessment that is, frankly, empty. These cases only stir at the surface of transgender life, and cover the law’s own edifice with significations that attempt to make sense of a social complexity it cannot hope to comprehend on the facts alone.

It is here that this investigation starts—at the surface of legal things and objects, in order to understand the language that constitutes legal subjectivity. In doing so, I hope to critique the underlying structure and ideological force of legal rationalism that creates the conditions for epistemic failure. In the structure of briefs, in arguments and claims, reside the stodgy and objective forms of human life—where a subject is split between h/er social self and the legal/empirical double, where the latter that is removed and examined. Indeed, h/er legal/empirical double *must be* rendered legible in order to make law work for h/er. It is, as it were, the structure in the law’s semantic universe that perverts the social life into a non-social language. “By limiting and filtering the visible, structure enables it to be transcribed into language” (Foucault 1994, 135).

Does this give an adequate reason to pause and question whether the courts provide what many in the liberal west have deemed the minimal conditions for justice? Due process, rights to attorneys, rights to witnesses, rights against discrimination, rights to equality. These conditions for justice help to constitute a massive structure, an edifice that spans far beyond the courts into the praxis of agents who carry out the law, to the very social subjects who must abide by the law, and who are interpellated by it. These interactions, this praxis, constitute the possibility for discontinuity—between the law’s text and spirit and its application, or between the social life of a legal subject, and their legal/empirical double. But aren’t rights supposed to shore up that discontinuity? When we look, however, the law’s surface is touched and riddled with discontinuities. Courts act in ways that attempt to make sense of an oftentimes-unintelligible world. Signs within the law’s semantic universe are taken for granted as being actually representative, as not themselves doing harm—but nevertheless getting its ontology and its epistemic commitments wrong.

In order to perform its rationalism and objectivity, the court must have its instruments through which decisions can be made—the court’s material, infrastructural life. Courts must compartmentalize its subject matter so that it can render what is just from what is not, what is injury-in-fact from what is merely incidental to the praxis of law. It must create constellations of texts and precedent; play with their meanings through briefs; make judgments as to their applicability to a given fact-situation. The court’s ‘microscope’ will be its briefs, its crucible that of litigation, and all of which are propped up by a commitment to objectivity. This objectivity pulls and attracts some signs and not others when dealing with cases of gender/sex, and more specifically of the transgender litigant: ‘sex’ and ‘ sex stereotypes’ not ‘gender identity’ or ‘transmisogyny’. It ignores some sets of rules while finding others inescapable: ‘the changing of sex is too drastic a social practice to be considered for “fair” grounds to sex stereotyping’ not that ‘the lived experience of the trans person in changing sex is an expensive, daunting, and burdensome process riddled with medical intervention and social violence.’ One can witness rationalism’s effects, it attractive forces, and can be read and qualified, perhaps quantified—but only at the surface on which legal descriptions are drawn up, and meted out as justice. This paper will explore some of those surfaces of the law in order to understand the hidden chains of that bind and constitute certain kinds of gendered and sexed legal subjectivities. In doing so, this paper seeks to address how trans subjects are made legible *as* legal subjects—and discussing the ways the epistemological framework of law’s rationalism is the very foundation of its own unconscious commitment to epistemic injustice. I agree with Currah (2003), that the argument that legal victories for transgender clients merely reinscribe a gender binary is tired. It is. But it is not the intent of this paper to take that move. Instead, it seeks to investigate the various ways that epistemic harm can attend these decisions, the varying degrees in which interpretive justice is denied, that the stark cisgenderism that ‘sticks’ to the logical analyses of the courts.

*Considering the Gaze: Objectivity and the Legal Photograph*

Although the position of an ‘objective judge’ seems most ‘fair’ in the sense that a judge is tasked with a Herculean feat of considering a totality of events and circumstances that fit a case, it nevertheless relies on a photograph of the injustice. The files and documents that make up the bulk of what a court considers, captures a moment of time—a mediating point where a litigant is reduced to representation of h/erself. In order to enact rationalism, according to Dworkin’s standard of objectivity (and later Habermas’), the judge must ‘weigh’ norms against one another in order to broach ‘its *appropriate reference to a situation*’ (Habermas 1999, 217; italics in text). But what are these norms? Equality, due process, objectivity, adherence to reasonable restrictions on private action—where do these norms fit within the legal photograph provided by the material files encumbering a case?

Norms, for instance, of equality often take for granted the lived experiences of marginalized people who: (1) do not have the interpretive epistemic resources to make sense of the their marginalization and, thus, (2) cannot comprehend themselves as equally protected from harm in either the public, legal, or private spheres (should those artificial divisions be granted ontological status). What norm(s) guide the court when a transgender woman is fired from her *public* job? As we shall see later, the norm of equality, through the lens of civil rights and protection from ‘sex stereotyping’, functions as a means of situating not just the identity of the trans claimant—but *all* potential trans claimants before the law.[[2]](#footnote-2) So scholars such as Latour dismisse claims to legal objectivity—a framework of reasoning that attempts to think itself as scientific. “In legal practice we are never concerned with rules but with more or less powerful texts, on which the dynamic of reasoning can or cannot rely” (Latour 2010, 160). Prejudice, bias—the markings that should prevent the always-objective judge from ever *really* existing as a judge, are also useful to understanding which texts preoccupy the reasoning in a cases disposition.

Some questions related to the epistemic failures of a court must turn on the material documents that form the otherwise ‘opaque’ web (Habermas 1999) of inter-textual action that work to produce law’s rationality. The semantic universe that encloses the linguistic space for lawyers and judges, and claimants and subjective life, is a constructed system made so by the need to compartmentalize and systematize, thriving in the episteme of rationality. Thus, ‘reason’ and ‘objectivity’ should be seen through the lens of epistemic relativism—that objectively referencing precedent (one type of text) about sex may necessarily marginalize and in fact epistemically damage a claim about transgender or intersex issues (the lived experiences of these subjects, another type of text).

“But the judges’ confidence would soon evaporate if, instead of having to make the few referential steps which they take when they track a map, graph, signature or opinion through their files, they had to cross the dozens of transformations that are necessary for scientists to establish a reasonably solid proof in a somewhat specialized field” (Latour 2010, 227). In every case, the judge, most fascinatingly, speaks as if they are dealing with reality—that the leap from object to sign is not there; that they have been dealing not with a photograph or sign, but with the thing itself the whole time. That there have been no transformations or mediating elements, but rather a direct line of information from that lived moment *to* the brief or *to* oral argument. And what of these transformations? “Legal reduction seeks to constitute a domain of unquestionable fact as quickly as possible…so that it can then subsume the facts into a rule of law…in order to produce a judgment…” (Latour 2010, 229).

The idea here is that in order to enter into such a rigid epistemological structure, one’s own life’s experience, a fortiori, must be whittled down to bare fact—that is, accepted fact within the translation of law. How is this radical translation a reproduction of epistemic injustice? On the one hand, epistemic justice requires a commitment on the part of persons and institutions to take the norms of self-reflexivity not at face value, but in practice (Medina 2012). This means that the relative privilege of each of the actors must be interrogated, by internally and intersubjectively, to determine the nature of the oppression at play. At its heart, epistemic justice in this sense is testimonial justice, the dismantling of power dynamics that produce and reproduce, through structural means, oppression. Oppression disables and disempowers statements of truth on the part of those oppressed. Gender, sex, race, sexuality, class, and ethnicity are all axes upon which testimonial injustice can actively play out.

Consider that when a court transforms the moment of discrimination or legal harm to a recognizable fact, it impinges on the ability of the subject to speak of that fact *as it was* or *in h/er own terms*. It must, rather, be spoken through the often challenging language of law. In short, h/er experience is made textual, but not in the text s/he wrote. Even if the judge allows a claimaint to speak on h/er own behalf, on the stand as it were, h/er experiences must be read finely through the allowed discourses of the court. Evidence is rendered out through motions and processes long before s/he reaches the stand. H/er story is inscribed on documents that have been reviewed and revised, read and re-read by various actors. H/er story is not h/er own, yet to the court it very much is; it is a direct line to reality. The extent to which self-reflexivity as a norm would permeate the gateway to the judiciary is at best questionable. It is only the epistemic input on the part of the claimant, in h/er own terms, and without the translation rendered by legal semantics, that can guarantee some adherence to a standard of epistemic justice just described.

And thus we have the indeterminacy of what is translated as accepted fact *within* the epistemological domain of law and what is fact as it was on the ground, for the claimant, and for the lives of those who will continue after the judgment of this translated fact is rendered. Indeed, the courts must dispense with uncertainty, and replace the merely epistemic doubt in their translation of a lived moment as mere philosophical artifice. “We are dealing with the facts.” But how these facts are construed, and under what prism the courts actively choose to view these facts through (be it precedent, argument, brief, or motion) are never admitted to simply alter them. It is indeed a ‘social construction’ thinking itself as dispassionate objectivity, of real human being in a text’s representation of that being—but plays a dangerous game of “a cynical nightmare of arbitrariness” (Latour 2010, 240).

**Star Trek and Picard’s Crucible**

A line from science fiction will help clarify the institutional conception of the courts: "Your honor, the courtroom is a crucible; in it, we burn away irrelevancies until we are left with a purer product: the truth, for all time.” The quote is from Star Trek: The Next Generation, where Captain Picard is asked to answer whether Data, an android (a machine built to look and imitate humans), is in fact a sentient being. He seeks to utilize the court as an instrument through which ‘irrelevances’ are ‘burned away’ for a ‘purer product’: the truth, that is to say the truth of Data’s *being*. Yet being in Data’s sense is already prefigured—for there are standards that preset the sentience that ultimately sets him free as a ‘unique’ individual. But what are irrelevances and how do they differ from valid points of fact? The court is then held to shed light upon matters of confusion, controversy, disarray. And Picard’s metaphor captures the essence of what courts do: That outside the light of the court’s reason is an unwanted and, in fact, irrelevant darkness. But does this darkness have any bearing on being, on the subject, on the person being constructed in the court as an empirical process of fact collection? Distinguishing the illegible, that law seeks to make known only a universal sense of being. Legal theory, written as justice, is nothing more than a masked humanism. It creates a universal subject—a transcendental subject—that burns away, or rather casts out, the ‘irrelevances’ that reason cannot ‘know’ and thus commits epistemic harm to the subjects whose lives are often lived in shadows in which the light of law hardly ever ventures.

**II. Trans Legal Subjectivity**

*Cisgender Precedent: Sex Stereotyping*

Each case, at least for this paper, that attempts to unravel the issue of transgender identity and its location within the American legal constellation rely upon the only Supreme Court case to date dealing with claims that potentially address the fluidity of gender identity, *Price Waterhouse v. Hopkins* (1989)*.* The 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*.[[3]](#footnote-3) In disposing the case, the majority held that such considerations were in fact made, and constructed discussion of gender/sex as one in the same thing. The judge went on to hold that the partners' remarks about Hopkins stemmed from an impermissibly *cabined* *view* of the proper behavior of women…” (*Price Waterhouse v. Hopkins* 1989, 237, emphasis added).

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, 237, emphasis added). By ruling in favor of Anne Hopkins claim, the Court certainly expanded the potential terrain in which legal discourses on gender could expand, but it did little to determine the exact qualities that gender and sex have in relation to one another. The language of the decision itself reaffirms the normative qualities of a fixed gendered subject, albeit hinting at the fluidic nature of gender ‘roles,’ that a woman may or may not be as aggressive as men, for instance, struck the Court as odd. Presuppositions of this latter sort on the part of Price Waterhouse constituted enough discriminatory behavior to support Anne Hopkins claim. What could not have been at issue, perhaps due to the limited discourses circulating in 1989 with regard to gender identity and trans identity, was the argument that a person’s gender and sex are not linked by nature. Certainly through identifying gender within a constructionist lens, the Court offered a new framework through which gender could be articulated in legal discourses.

Within the framework of this paper’s question, the Court’s own documentation became an issue at one point in the opinion. The Court took issue with Price Waterhouse’s legal brief in which it bracketed off sex stereotyping with quotation marks.[[4]](#footnote-4) The very nature of how social realities are framed by procedure and documentation are generative for a court to render its decision. In part, the Court was clearly impressed by the lack of respect on the part of Price Waterhouse’s brief with regard to the potentially serious issue of sex stereotyping.

*In Medias Res: The Glenn ‘Victory’*

I should start with a legal victory, in the middle of a chronology of legal decisions. This case is one in which the potential for understanding trans life was there—but one that took sides of the epistemic sort that categorized sex in such a way as to be read as epistemically unjust. Vandy Beth Glenn, a transgender woman, had been employed at Georgia’s General Assembly’s Office of Legislative Council as an editor and proofreader of legislation. ‘Suffering’ from and diagnosed with what had been previously defined as Gender Identity Disorder, Glenn sought to confirm her natal sex with that of her gender identity. Through a medical process that includes psychiatric care, hormonal treatments, and surgical alterations, Glenn took on the medical hurdles to confirm what she already knew was true: her natal sex of male was false; she was a female.

In 2007, she informed her immediate supervisor of her intention to undergo treatment for Gender Identity Disorder (GID, a now outdated medical diagnosis). Upon being informed of Glenn’s decision, the General Assembly’s Legislative Counsel, Sewell Brumby, terminated Glenn’s employment. She filed suit in 2008, winning her case at the district level. She advanced that her rights under Title VII’s sex stereotyping doctrine had been violated; she made an auxiliary claim that she was discriminated against on the basis of her medical condition.[[5]](#footnote-5)

In determining the extent of Vandy Beth Glenn’s claim under Title VII, it held the following definition of trans: “A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes” (*Glenn v. Brumby* 663 F.3d 1312 (2011), 1317). On this view, the 11th Circuit went on to write that “there is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms” (*Glenn,* 1347).

Lambda Legal’s brief to the 11th Circuit relied heavily on the construction of the transgender subject through the lens of biology, particularly that provided by the definition of GID—and adopts the positions that sex and gender are interlinked conceptions that should not be separate by legal considerations. In their attempt to elaborate an ‘authoritative’ case concerning the issue of a transgender individual facing discrimination, Lambda Legal argues that “far from relying on the theory that gender identity is a component of sex, the *Schroer* court eventually rested its holding on an alternative, *common-sense* *proposition* that one who fires someone for transitioning from male to female is discriminating because of sex.”[[6]](#footnote-6) But sex in what sense? Biological and thus easily referred and not socially situated and thus not so easily translatable.

Gender/sex for the 11th Circuit was both restricted by considerations related to traditional sex discrimination and stereotyping (as controlled by precedent and the legal arguments brought by Lambda Legal) and the medical designations of being *trans*gender (of suffering from GID). What this means is that in order for the 11th Circuit to properly dispose of the case in the fashion prescribed by precedent, it had to situate Glenn in a framework that placed her as either male or female. In doing so, and in a fashion highlighted in Lopez’s work on legal subjectivities, the court was then able to apply the doctrine of sex stereotyping (one already fully elaborated by the Supreme Court nearly two decades before) and find in favor of Glenn’s claim. It was clearly a victory for Glenn, whose job was reinstated and whose lost pay was remunerated. One form of the question of this paper is the extent to which the line of legal inflection, the mediating point between the social world and the legal world, distorts and recomposes the lived experiences of trans subjects beforethe law.

The translegal subject undergoes a radical mediation. No longer simply an agential construction of social relations, the *trans* legal subject is rather a fixed entity into which the terms male and female must fit for precise legal dispositions. The social qualities of this transperson become the legal qualifications the court imposes for legibility’s sake. They are women or men by category; within that category alone can we define discrimination as operational for the court’s adjudicative purposes. The category of transgender disappears in the face of normative gender considerations for legal purposes, becoming embedded in a broader discourse of the gender/sex binary. Cisgender in fact takes the place, and acts as presence for the transgender subject before the law. Another passage from the 11th Circuit’s decision:

All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype. For example, courts have held that plaintiffs cannot be discriminated against for wearing jewelry that was considered too effeminate, carrying a serving tray too gracefully, or taking too active a role in child-rearing (*Glenn* 1319)

Eliding the trans experience altogether in articulating a broader transgender claim protecting transgender identity and expression as cisgender identity and expression, the court engages in a discourse on cis-sexism. A man who is too ‘effeminate’ or a woman who is too ‘masculine,’ delves rather loosely into what trans subjects represent before the law—the re-composition of the gender binary to include individuals who do not claim some lived status of being cis. Indeed, what this kind of mediation engages in is a partial erasure of translife in its multiple forms, in order to bring about the clarity of a single definition for legal purposes. It privileges a normalized view of gender/sex, such that trans subjects ought to fit the role of male or female, so defined. The transperson has their legibility solely based on their comporting to one or another mode of being, or of outward bodily appearance, or fulfilling medically necessary procedures to those ends (see Butler 2006).

*Trans Bodies from Cis Bodies: The Epistemic Injustice of the Law’s Ontology*

In his analysis of gender construction before the law, Currah (2006) sees that most winning arguments follow the standard pursued in the *Glenn* court. In fact, past cases (viz. *Doe v. Yunitz* [2000] and *Youngblood v. School Board of Hillsborough County* [2003]decisions present the courts with three distinctive forms of arguing *in the name* of transgender, and the client h/erself. For the *Doe* court—in which a transgender youth was forbidden by school administrators from wearing feminine attire (she was male-bodied)—advocates argued from the standpoint of pathology (the now outdated DSM-IV diagnosis of Gender Identity Disorder). Donning feminine attire and comportment was necessary for *Doe*’s ‘condition’ and thus the school violated her rights under a disability claim. Advocates also argued that the school administration violated Doe’s free expression rights, but attempted to tie these expression rights as one that was not *merely political* in nature, but was representative of Doe’s inner core, her identity. They thirdly argued that the school had no ‘compelling interest’ in prohibiting Doe’s dress and appearance, as it constituted sex discrimination. That is to say, if the clothing were ‘unobjectionable’ if worn by a girl, why would it be necessary to prevent a male-bodied person from wearing such clothes?

The power of a legal argument to construct a gendered subject relies on a certain cisnormative logic within a socio-legal imaginary of gender/sex. There are modes of existence, as male or female bodies, that are then understood through recourse to man and woman, masculine and feminine—an inflecting point that naturalizes ways of thinking through birth-assigned sex as the start from which we can gain closure to an open-ended question. The anchor is always already the body of a cisgender individual who *makes legible*, as a heuristic, the life and being of a transgender person. As mentioned, this affects directly not only the outcome of the case but the precedents they invoke as a result. For *Doe*, the court ruled in favor of advocates’ free expression claim, hinged on the belief that “If the answer was [that girls were prohibited from wearing certain clothes], the court reasoned, Doe is being discriminated against on the basis of her sex, which is biologically male” (Currah 2006, 9). Doe’s disability claim was later upheld, whereby her psychiatric health was being proscribed when a school prevented her from expressing her gender.

Currah: “From the perspective of a transgender rights advocate, of course, the real trouble lies in the judge’s binary approach” (2006, 11). That which allows the court to make extant law and precedent and the fact-situation before it intelligible usually defined transgender through the lens of dichotomous being. But whereas Currah is unwilling to critique the identitarian claims that have enabled many transgender clients to win their lawsuits, I am willing to push a further deconstruction of these liberal claims as they, themselves, often work to the service of already privileged conceptions of bodies. Working from within the construction of gender as a liberal rights mechanism reinforces the universality of law, that justice in its social context is consistently deferred in favor of those claims whose articulations are made most intelligible given our normative rights based assessments (Spade 2011). “As I have pointed out elsewhere, this body of law is riddled with contradictions; the notion that there is some hidden analytic key that, when discovered, will reveal the law’s underlying logic assumes an ideological coherence that is just not there” (Currah 2006, 13). Far be it from assuming an underlying *ideological coherence*, there is, from the numerous perspectives already elaborated in this paper, a homeostatic quality of the law. It is only the surface level contradictions that seem to disjoint the argument for ideological coherence. But the surface level inconsistencies all suggest the rational pull from within the structure of law.

These surface irritations are reproductions of mechanical *rationality and reason* that in tandem work to establish law in reality as a monolith, accreting from time to time new changes, but sediment-ing these changes in relation to its underlying anchor. The law is an ideological apparatus that often upholds, through likewise ideologically filled jurisprudence, interpretations that validate normative modes of existence, that is to say being (see especially Habermas 1999; Fricker 2007).

I agree with Currah that one must weigh the relative strengths of these victories against the desire to critique them on their own terms. Cisgender people are indeed endowed with a privilege is expressed not only as consistent victories on their behalf, but in the writing of law that is negotiated on a cisnormative terrain. Yet avoiding the critique of the writing of law, of its winding paths, as it were, is to avoid a critique of the epistemic side of legal decision-making and the construction of subjects before the law, as they live within the law, and as they are understood outside the law.

Perhaps the greatest impediment to developing a more inclusive, perhaps agonistic, legal definition of transgender is the relative newness of the question. This poses the great risk of having only a handful of cases in which a claimant is posing a legal injury before the court on the status of *being* transgender to call representative.[[7]](#footnote-7) What does occur, however, is a range of cases—admirably outlined in Gordon’s (2009) account of advocacy work on behalf of transgender claimants—that deal with the ‘woman/man question’ rather than the ‘transgender question.’ I hope to point this out in more detail, and not to be too repetitious in this re-telling. That from the Supreme Court’s handling of gender in *Price Waterhouse* decision to the 11th Circuit’s recapitulation of that view in the *Glenn* case—we see a distinctive reification of gender binarism. And at the risk of colonizing transgender experience with an immediate destabilizing quality, what these cases do not take into account are the ways that trans experiences of discrimination, a fortiori, differ from those whose bodies that meet a cisnormative standard of passing, which I will explain later as an ontologizing of the cis-body.

Gordon’s (2009) coverage of transgender legal advocacy is quite vast, and situates transgender rights within an ambit of discriminatory claims in the workplace—particularly those that evoke Title VII of the Civil Rights Act of 1964 (Gordon 2009). Her first move is to make the claim “Trans advocates have not been oblivious to Title VII’s potential as a tool of trans liberation, and, in fact, have brought numerous cases under Title VII on behalf of transgender persons. However, although there has been some progress in recent years, most courts continue to define sex according to biology, and especially genitalia, and have thus been reluctant to recognize discrimination against transgender individuals as sex discrimination proscribed by Title VII” (2009, 1720). This critique is spot on, but changed markedly following the *Glenn* court. The court in that case *did* bring sex stereotyping under the ambit of Title VII, without the apparent reduction the trans claimant to her genitalia. This, of course, is not the entire picture as I’ve highlighted. Glenn’s advocates brought before the court an entire array of medical discourse that did, in fact, biologize the claims that Glenn sought to have redressed. She was a woman—her transition, as it were, was a part of a natural process to fit the body she *should have* been born with. And in that capacity, the court did in fact see Glenn as a woman in a biological sense, which works against Gordon’s (and I cautiously use this term here) hopes that advocates and courts avoid such a biological reductionism.

Yet, Gordon’s article is a fund of analysis of cases related to the legal construction of cisgender conceptions of gender. The article itself seeks to appeal to a certain ‘postmodern feminism’ in order to destabilize the ways that legal analyses have treated this social marker. I, myself, do not subscribe to the belief that postmodern feminisms are the only ways we might do this. Such a claim, that is Gordon’s claim, (rightly) ontologizes an inherent instability in the ways gender/sex works at the lived level. But it does nothing to the extent of making an epistemological claim of the lived experience when it reaches the distortive universe of the law. What, if anything, happens to the subject within the legal construction of the gendered or sexed experience? Does the act of discrimination invoke the need to understand that lived experience for its epistemic content? Or does the need recognize the trans subject’s ontological status as stable rather than unstable push for a rationalistic perspective on how to dispose the case? Gordon hopes to push against this need to ontologize life as stable. Forst instance, Gordon, using Angela Davis’ work on anti-essentialism, works to provide an intersectional analysis within the legal domain. But she fails to take up the epistemic harms that attend the entry into the semantic world of legalism. That these experiences are transformed by the mediating moment of entry is a mystery left outside the purview of most legal thought. This doesn’t destroy Gordon’s incisiveness or the integrity of the claims she and other postmodern feminist thinkers make. But it does hint at the shortcomings of an entirely legalistic perspective on this matter. Indeed, from Katherine Franke to Gordon herself, there is an inherent respect for the edifice of liberal rights regimes that props up the text. It is, after all, all we have. I do not share that respect. Nor do I do not share the hope that the institutions of law, the juridical apparatuses, themselves have the capacity to transform from within. What we take to be transformations at the epistemic level are merely surface irritations to the universal adherence to rational discourse. Courts adhere to the need to find reasonable outcomes to the inconsistencies that life’s abundance and diversity produce, the law and its enactments produce, and how these inconsistences square with a constitution of rights.

Other cases before *Glenn* adopted varying standards of sex stereotyping that *Price Waterhouse* classified as violations of Title VII. *Schwenk v. Hartford* was a Ninth Circuit case that heard the claims of a self-identified transsexual woman who was assaulted by a prison guard. She won her case. For Gordon, this was an important step for understanding transgender in the constellation of statuary rights post-*Price Waterhouse*. Sex and gender were seen as co-implicated markers that could be used to affirm an individual’s claim to discriminatory injury. A similar disposition was held in the case of *Rosa v. Park West Bank & Trust Co.*, where a man, presumably cisgender, filed a complaint under a separate Equal Credit Opportunity Act, when he was denied a mortgage. His claim was that because his attire was ‘traditionally feminine’, the lenders discriminated against him on the basis of gender expression. The First Circuit agreed, using the *Price Waterhouse* collapse of sex/gender.

In *Barnes v. City of Cincinnati* (2005)*,* another self-identified transsexual woman, who at this moment was ‘pre-operative’, failed to conform to her probationary period to become a police sergeant. She filed a claim that suggested this denial, the denial of her potential promotion, was an act of sex stereotyping. The Sixth Circuit agreed. But as Gordon rightfully points out, the court, although denying the city’s claim that Barnes did not belong to a ‘protected class’, did not specify what class Barnes did belong to. What experiences were missed? What reified notions (however potentially generative the sex/gender collapse had been in the *Price Waterhouse* precedent [Gordon 2009]) were present in this reiteration of ‘protected class’? Transgender was a marked category outside the ambit of immediate legible protections, and most cases that followed this decision followed a similar, but sometimes devastating, logic.

In *Kastl v. Maricopa Community College* (2006), transsexual woman, was terminated from her position as an adjunct professor when students began complaining that ‘a man’ was using a woman’s restroom. Kastl filed suit, but her claim was ultimately refuted—even on the basis of the sex stereotyping protections she invoked. The district court relied the college’s claims that sex must be construed through the lens of biological distinctiveness—particularly that of hormones (endogenous, not exogenous), chromosomes, and certain ‘phenotypic’ characteristics. She did not meet any of these biological makers. Her claim was summarily dismissed. The Ninth Circuit upheld the dismissal, noting Kastl’s ‘rightful’ admission that she had experienced discrimination on the basis of sex stereotyping, but failed to answer the existing claims of ‘safety’ that the college invoked—in that Kastl failed to show how this issue of bathroom safety was discriminatory on the basis of Kastl’s gender.

In *Creed*, a trans woman was fired from her job because of her ‘increasingly feminine’ appearance (she was perceived as male-bodied). The decision of the court rendered the *Price Waterhouse* standard as such:

[A] transgender plaintiff can state a sex stereotyping claim if the claim is that *he* or *she* has been discriminated against because of a failure to act or appear *masculine* or *feminine*  enough for an employer, but such a claim must actually arise from the employee’s appearance or conduct and employer’s stereotypical perceptions(citied in Gordon 2009, 1734, emphasis my own).

Note the signs. Note the need to understand the claim along the rational basis of male and female, he or she, masculine or feminine—and not appeal to the ontological assumptions of an unstable lived experience *as* trans. Indeed, the *Creed* court upheld a standard that stated plainly “Title VII does not protect transsexuals” *per se* (Gordon 2009, 1734). The material and epistemic harms engendered in these renderings shouldn’t be overstated. First, a woman lost her job because her status as a transgender woman, as transgender, is not a protected class in the constellation of protected classes of marginalized people in American liberal rights. Second, the epistemic injustice at work is the recapitulation that trans experience(s) can only ever be rendered out in these neatly punctuated categories in which male and female can be affixed to them. Where the gendered expression of each entails masculine or feminine**.** *The ontology of the courts is that of a cisgender body as* the *body from which the transgender body is to be constructed.*[[8]](#footnote-8), an unstable identity cannot be situated within a fixed constellation of rights (for how a queer politics comes undone under this, see Gamson 1995). Thus, models of litigation that frame the transgender client in terms not of trans being, or being trans, but rather in articulating them through recourse is a certain validity to cis-ness are nevertheless *thinking itself* as inclusive through a nevertheless systematic, and potentially systemic, exclusion of transgender epistemic practices.

The danger of legal discourses on the issue of *trans*gender legal subjects is that much may be lost in the mediation between social reality and legal reality. In the effort to circulate coherence, to apply a standard that will dispose a case and apply law in a just and equitable way, courts must construct artifices, relying on the documentation before them, to satisfy claimants who are now *against* the law. What is at stake is continued coherence of precedent, of legal standards that must be applied to future cases that make sense of otherwise obscure social realities.

In adopting this view, my intent is not to describe the courts as institutionally incapable of appreciating the complexities of social reality and the lived experiences of transgender people. Rather, the mediating artifices that help shape the coherence of law keeps at a distance the law on the one hand and concrete social relations on the other. They are hemereneutic closures, a system in which the trans subject is not lived so much as represented. Indeed, for the transgender legal subject, it is not that they *must* conceive of themselves as positioned within the gender binary *because of* their dependence on law; rather, in order to make claims of discrimination, they must be willing to mediate their everyday experiences through the rationalized gaze of legal documentation (briefs and claims and dockets and their legal representation) and to the application of precedent that circulates in the legal universe. Such is the ongoing epistemic failure of legal institutions.

A central point I wish to make in this discussion is that the translation of lived experience into discourse, and particular here into the semantic universe of the law, is one that requires serious epistemic investigation. Making the claim that epistemic justice is often denied in even the latest victories for trans people is making the claim that in some form, the mediations and transformations induced by legal semanticism and the law’s necessary documentation of a transgender client produces a calculable epistemic failure. Justice is, then, not one based on the weighing of outcomes as they pertain to the common good (whatever that might mean) or for the purposes of aligning known (read translated facts) with commonly held conceptions of the law. Justice is practice, in a radical sense it is one that incorporates the fullest extent of truth-telling and knowledge production on the part of a marginalized litigants.

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1. Throughout this paper I adopt the diminutive ‘trans’ to signify both the construction of ‘transgender’ in the legal domain and the subjects themselves who identify as transgender outside that domain. This choice does not exclude the possibility of ‘trans\*’ nor the inclusivity that the asterisk provides. See GATE (2014) entry for more information on the ‘\*’, or Valentine’s (2007) ethnographic work on ‘transgender’ as a category. [↑](#footnote-ref-1)
2. How does this norm impact a trans woman of color who, living in poverty, has no access to a living-wage paying job, transition related healthcare, or housing? Thus, norms (whether norms of liberty, equality, to bodily integrity or personal cultivation) within these legal contexts do not, a fortiori, take difference and otherness (to use a philosophically laden term) seriously. They can only count upon what fact-situations are at play in the present instance of the case. [↑](#footnote-ref-2)
3. The Act itself designates ‘sex’ as a protected class from discrimination, but does not define gender or its relation to biological sex. [↑](#footnote-ref-3)
4. The Court says “Although the parties do not overtly dispute this last proposition, the placement by Price Waterhouse of "sex stereotyping" in quotation marks throughout its brief seems to us an insinuation either that such stereotyping was not present in this case or that it lacks legal relevance. We reject both possibilities.” [↑](#footnote-ref-4)
5. Lambda Legal, Glenn’s nonprofit counsel, writes on their website that: “There is no federal law explicitly prohibiting discrimination against transgender people in employment, although many courts have held that transgender employees are protected under sex discrimination laws. While a growing number of cities, counties and employers prohibit discrimination based on gender identity and expression, transgender people remain disproportionately vulnerable to discrimination because of widespread bias and lack of understanding of the law of sex discrimination.” Available at http://www.lambdalegal.org/in-court/cases/glenn-v-brumby-et-al. [↑](#footnote-ref-5)
6. Lambda Legal, Brief of Appellee Vandiver Beth Glenn, PDF available at http://www.lambdalegal.org/in-court/legal-docs/glenn\_ga\_20110201\_brief-of-appellee, 32. Emphasis my own. [↑](#footnote-ref-6)
7. Representative: that, by the fashioning of the question(s) I have posed throughout this article would court its own type of epistemic mistake. [↑](#footnote-ref-7)
8. This body is also normalized as white bodies. [↑](#footnote-ref-8)